82-525

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THE SUPREME COURT OF THE UNITED STATES

M. W. ZACK METAL CO.,

Petitioner,

-against-

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE, HANS H. JANSEN, JURGEN N. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP MUTUAL INSURANCE ASSOCIATION LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. With respect to the District Court's decision of dismissal of four causes of action on motions under Rule 12(b), wasn't it and the majority opinion in conflict with the general rule stated in the statute and the applicable decisions of this court and of all the Courts of Appeal in the land, because the facts alleged would, if proven, entitle plaintiff to the relief sought, and that all well pleaded allegations would be deemed addmitted, and, reversible error was made below.

2. In respect of the first three of the four causes dismissed, the second and third would stand or fall as the first would stand or fall. The first was dismissed by the alleged operation of COGSA's time limitation. Plaintiff claims that that was error because this suit was not subject to COGSA's time-bar because that right of the ocean carriers was defeated by the prior timely commenced suits on this claim. May COGSA be so interpreted? This is a novel question, never having before been decided. Additionally, weren't the ocean carriers estopped from asserting the bar of COGSA in this suit because of the fraud they perpetrated in the prior timely brought suits? Weren't these factors required to be tried? The applicable decisions of this court say these factors should have been tried.

3. The fourth cause of action that

was dismissed was a count alleging "Frauds upon the courts" in three prior suits for this claim. Plaintiff claimed damages. The suit was wrongfully dismissed because issues of fact were presented and especially that "scienter" is an element which must be tried. The decision of the Court of Appeals apparently did not appraise properly the effect of Marshall v. Homes, 141 U.S. 589 upon the case of the United States v. Throckmorton, 98 U.S. 61. This court's power of supervision would be extremely useful in settling the issues raised by the Court of Appeals decision. There are several cases of the Second Circuit that seem to be at odds on the question of what part extrinsic fraud now plays in view of the provisions of Rule 60(b3) which seems to have eliminated the operation of the distinction between intrinsic and extrinsic frauds. Even whether the distinction operates in plenary suits should be settled. This cause would provide a catalyst for all of the foregoing questions.

4. The last of the five causes of action, the fourth in the complaint, was tried, without a jury, despite the fact that a demand for a jury was inscribed upon the summons and complaint when served upon the defendants, charterers and shipowner in early November 1980, and as the claim was to recover money damages for a breach of contract, the trial was a violation of the Seventh Amendment to the United States Constitution.

5. The district court's dismissal of the suit on the guarantee, without prejudice, was based on a finding that a final judgment on

the basis of the Appellate Court's decision was not entered. The guarantee was given to stay execution upon a judgment to be appealed. It stated that the guarantee would pay "pursuant to a final decision of a German court". The court erred in reading that finding in the guarantee and in holding that such a failure was chargeable to plaintiff instead of defendants because the idea of a "final judgment" was advanced by defendants. There is no issue raised in the pleadings that a "final judgment" was a pre-condition for the promise to pay to accrue. The issue according to the only pleadings filed is whether the decision of a German court had followed on the appeal from the June 15, 1971 judgment. The decision of the Appellate Court of January 9, 1975 was the decision upon the appeal from the judgment of June 15, 1971. The Appellate Court decision would and did accrue the promise to pay and the failure to pay was the breach of the guarantee. This completed plaintiff's prima facie case under the pleadings. The damages could have been fixed at the trial but were not. That was an abnegation of the trial court's jurisdiction to make the decision according to the facts. Failing to exercise its jurisdiction is constitutionally impermissible.

6. Wasn't the recognition that plaintiff was owed money from the defendant Newcastle an admission that plaintiff was entitled to recover? Wasn't the refusal to accept the

fact that the failure to pay was a breach of contract, a refusal to accord the plaintiff due process or the equal protection of the laws?

7. The district court's attention was called to the fact that the exhibits before the court showed that defendant's insurers had agreed with their German counsel to misstate the fact that Mr. Kruse had authority from Mr. Burns to bind the shipowner to the extension of time to sue to May 15, 1961, and that they were advancing the untrue claims that he did not have that authority and did defraud and deceive the Appellate Court to render its decision of January 9, 1975 which dismissed the suit as against the shipowner. The letters proving the agreement to lie rendered the judgment null and void. Hence, while that decision had accrued the promise to pay the guarantee, it could not be said that it had standing to pronounce the amount due. Plaintiff was not obliged to accept $33,000. and suggested to the court that he fix the damage. The district court has power to apply quantuum meruit as the basis for a decision fixing damages. When it refused and said "without prejudcie" wasn't it avoiding doing its duty according to law? Wouldn't it be important to correct the district court's action in the interest of justice? The majority opinion, too, should be overruled and the minority's rule that plaintiff had the right to bring suit on the guarantee after the Appeal Court published its decision should be established as the rule for this case, if a trial is required.

8. Didn't the district court deny plaintiff the due process guaranteed by the Fifth Amendment in arbitrarily dealing with the facts of this case, in picking and choosing as controlling and dispositive certain of the facts and denying its consideration to other facts on a motion to dismiss, in refusing to deal with the false facts stated by defendants in their briefs on the motion to dismiss when they claimed that Newcastle had a lien on the recovery upon plaintiff's proceeds in the German judgment by reason of a claim for an offset against the plaintiff which should be tried and yet those claims were made without their having been pleaded by defendants in their answer to the complaint and there was no such issue pleaded or raised, and objections were filed by plaintiff to a trial of such an issue without pleadings, and the proof made was that Newcastle did not have the offset claimed, nor did it have the lien claimed. These facts were proven to the court by proof made by conceded and admitted facts. Shouldn't the Court of Appeals have used its power to correct such an abuse of discretion?

Furthermore, wasn't the proof by plaintiff that the attachment filed by Newcastle against the proceeds of the German court without right of offset, proof of the truth of the falsity in the papers said defendant Newcastle had filed in the German court, and by the same token, wasn't the contrary claim of the defendants in their briefs false and submitted with the intent to defraud the

district court to effectuate the denial of plaintiff's claim by the district court and the plaintiff's complaint against such fraudulent tactics, having been ignored by the court, wasn't such action contrary to the applicable decisions of this court on the point?

9. Wasn't the majority opinion in ignoring the foregoing state of facts, a denial of due process and contrary to the true administration of justice, because it placed an unduly great weight to the district court's decision in the face of the obvious errors in it, called to its attention.

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The petition of M. W. Zack Metal Co. through its attorney, ANTHONY B. CATALDO, for a Writ of Certiorari to review the judgment and orders of the United States Court of Appeals of the Second Circuit entered on the 12th day of April, 1982, respectfully shows.

STATEMENT UNDER RULE 28.1

Petitioner has no parent company nor does it have a subsidiary or other affiliated company.

OPINIONS BELOW

The opinion of the Court of Appeals which has not yet been reported, appeas in the appendix set forth hereto. There were two decisions by the District Court of the Southern District of New York. They have not been reported but are a part of the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 12, 1982. A timely petition for re-hearing en banc was denied on June 4, 1982, and this petition for Certiorari is being filed within ninety days of that day. This court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUS INVOLVED

The Carriage of Goods by Sea Act ("COGSA") 46 U.S.C. Section 1303(6) which in pertinent part reads as follows:

"Section 1303' Responsibilities and liability of carrier and ship: * * *.

(6) Notice of Loss or Damage; Limitation of Actions * * *

* * * In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless a suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: * * *."

N.B. The next page is p. 5. The questions presented have been removed to the front of the petition.

in respect of loss or damage unless a suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: * * *."

STATEMENT OF THE CASE

This suit is essentially one in admiralty for cargo damage to a shipment of steel coils used for the manufacture of automobile bodies. The steel was purchased by plaintiff in 1960 from a steel mill in Austria and was shipped to Antwerp for loading on board a vessel there called "SEVERN RIVER". There were 93 coils in the whole shipment, weighing 443.1 metric tons. They were placed on board the SEVERN RIVER which was owned by defendant International Corporation of Monrovia and chartered by the defendants Hans H. Jansen and Jurgen K. Krafft of Hamburg, Germany, doing business as Jansen & Company, who in turn was doing business as Contam Linie and the latter issued bill of lading on their own form, but had it signed on behalf of the master of the vessel by Furness Withy & Co., ship's agent at the loading port of Antwerp. The bill of lading is numbered 35 dated January 16, 1960 and states that the steel was received on board in good order, and on its face the bill expressly states "Clean on Board". The bill also states that the cargo will be discharged at New York, its declared destination.

Concedely, the steel arrived in damaged condition. It was stored in bond, when

upon it's being sighted by plaintiff's customer, the customer refused delivery of it. The steel was left in bond and a buyer for it as sound steel was sought but no buyer would buy it as sound steel. In May 1960, upon agreement of all parties in interest, including the shipowner and charterer, the steel was sold "as is, where is" for $42,972.98, C.I.F. New York. The conceded measure of damage is the sound value of the steel at time and place of delivery plus expenses of handling the damaged steel less the value of the steel in damaged condition at the same time and place of delivery. An arms-length sale of the steel in damaged condition is usually accepted as the value of the steel in damaged condition.

Consequently, plaintiff followed these precepts to establish the loss. After deducting the expenses of the sale and of handling the damaged steel, there was a net of $30,000. remaining from the purchase price in damaged condition. The sound market value was approximately $117,000. or $118,000. This created a loss of approximately $79,000. The plaintiff has sought recovery of this loss from these defendants since the date of delivery, February 16, 1960, but it has never been collected. Plaintiff instituted four suits before this one. In three, there have been non-suits that did not reach the merits. In the fourth, there was a judgment for plaintiff after trial; but that judgment has not been collected to date. It was believed that this suit

would have produced a judgment that could have been collected upon, but the dismissals of the Trial court prevented the collections.

In early 1961, anticipating a one-year time for suit to expire as is stated in COGSA, plaintiff requested of the ship's and charterer's agent at New York, the Oceanica Company of Canada, Inc., to grant an extension of time to sue to May 15, 1961. A letter was written to that firm dated January 27, 1961 requesting said extension of time from the vessel and the charterers. While awaiting the return of the letter, the plaintiff on February 11, 1961 filed its libel in admiralty in the Southern Disrtict of New York naming the charterers and the vessel as respondents. After the filing of this libel, the plaintiff received, the letter from the New York agent of the ship and charterer extending plaintiff's time to sue to May 15, 1961. The charterers were insured for their charterers liability by defendant, Newcastle, and the shipowner was insured by defendants, London Steamship. Settlement talks were unsuccessful and time to sue was again approaching the May 15, 1961 deadline.

On May 13, 1961, plaintiff commenced suits in the District Court of New Jersey, and in the Eastern District of New York and in the Court of Hamburg, Germany. The two suits in the United States Courts were exactly the same as the suit in the Southern District County Court of the Southern District filed February 11, 1961. The last suit named the charterer and shipowners, was

an in personam suit, pursuant to the law of Germany.

Some time in 1961, the New York agent of the charterer and ship, Oceanica Company of Canada, Inc., discontinued its business and offices in New York and it seemed to have disappeared from the New York business scene. Processy in the suits in this country could not be served as there was no one on this side of the ocean to receive it. The suit in Germany was prosecuted according to German practices and rules and a first judgment was rendered on May 15, 1966, holding the charterers liable but withholding the fixation of damages until later. On June 15, 1971, the German Court made its second decision, this time awarding damages of $64,018.05 against the charterers. On December 7, 1971, a third judgment was made awarding the plaintiff the same judgment of $64,018.05 against the charterer and the shipowner, but it limited the execution upon the judgment as against the shipowner to levy upon the SEVERN RIVER, which the court said in the same judgment, was then sailing the high seas and was amenable to such execution. This limitation upon the execution was made in accordance with German law. It is subject to change if the ship was found not amneable to levy. In fact, she had foundered on rocks in the Far East and was withdrawn from navigation some three years before the decision. This fact had been withheld from the trial court and the parties, instead counsel for defendants (representing the charterer and shipowner at the request of their respective insurers) requested

the court to limit the execution to the vessel.

Appeals were filed and the charterers requested a stay of execution pending appeal. It's insurer, Newcastle, offered its written guaranty to pay the judgment appealed from "pursuant to a final decision of the German Court".

The shipowner refused to file an undertaking because no levy could be physically made upon the SEVERN RIVER. Plaintiff feeling free to enforce that judgment against the owner moved against a sister-ship, the Virtus, which was putting into Norfolk in April 1972, which was arrested upon a complaint in admirably on the original cause of action plus allegations of the entry of the judgment in Germany on December 7, 1971. The owner moved to quash service of process, but in some manner, the court treated the motion as one for summary judgment against the protest of the plaintiff. The court rendered a long opinion, not reported, dismissing the action on the grounds of res judicata, there was another action pending for the same cause, the bar of COGSA, and that the German judgment was an "in rem" judgment and it could not be sued upon against the owner. An appeal was taken to the Fourth Circuit Court of Appeals which rendered its decision dismissing only upon two grounds and disregarded the others. Those two grounds were the time bar of COGSA and that the judgment was only an "in rem" one. A few days later, the Appeal Court of Germany rendered its decision of January 9, 1975. That judgment reduced the recovery against the charterer to

$33,000. and as to the shipowner, it dismissed the claim saying that the one year limitation of the German Commercial Code will be applied to dismiss the action of the shipowner because the court found that the shipowner's agent in New York did not have authority from the owner to extend the time to file suit to May 15, 1961. For this reason the court held that the start of that suit on May 13, 1961 was untimely according to the German Commercial Code.

Upon receipt of the German Appeal Court decision, plaintiff moved the Court of Appeals to reargue, offering that decision, to claim that whether the jdugment of December 7, 1971 was "in rem" or not was rendered moot, and, that its finding that the suit in Norfolk upon the original cause of action was time-barred was incorrect by reason of the plaintiff/start of the suit in New York before the expiration of one year limitation. The Fourth Circuit granted the motion to the extent of withdrawing the defense of the time-bar to COGSA, saying plaintiff is free to start suit, but it refused to remand the case on the original cause of action because it said that plaintiff had declared on the judgment, it could not now change its mind. A petition for certiorari was denied. The plaintiff sought to restore the suit in the District Court of New Jersey to the docket. That case had been dismissed without prejudice for lack of personal jurisdiction over the respondents. Plaintiff also sought an amendment to the libel to change the respondent SEVERN RIVER to her owner. The Court would not

pass upon the application, exparte; it requested plaintiff to bring in the shipowner. The shipowner had a representative at Baltimore, Maryland named Tidewater Commercial Company. The motion papers were sent to them with the explanation that the court had requested the shipowner's appearance to state their position with respect to the motion papers, which were enclosed. Tidewater turned the motion papers over to La Morte Burns & Company, the representative of the insurers at New York, who employed Newark counsel to appear for the shipowner to argue against the motion. Counsel then appearing specifically for the shipowner only, argued against restoring the case, claiming res judicata against the charterer and the shipowner, that COGSA's limitation of one year expired. The res judicata was effective by the judgment in Germany. Both arguments were not true. In fact, the suit had been timely started and its start had been communicated to Mr. Burns of La Morte Burns & Company in early May 1961 when they had offered plaintiff a further extension of time before May 15, 1961. The court denied the motion altogether because of the time-bar. Appeal to the Circuit Court of Appeals ended in affirmance, no opinion, and certiorari was denied.

In retrospect, it became clear that defendants were represented by their insurers. The latter appointed the attorneys chosen to work for the insureds' interest and who thought nothing of advancing untrue fact statements to the courts and causing such untruths to be accepted as dispositive of the case. That action was "Fraud upon the court"

starting with the limitation upon the judgment against the shipowner of December 7, 1971 which limited the levy of execution upon a vessel which had sunk and was withdrawn from navigation. Later, to the Appeal Court the same counsel argued that the extension of time to sue to May 15, 1961 was signed by an agent who did not have authority to sign for the owner when the truth was that Oceanica of Canada was the ship's agent at discharge at New York on the occasion in question, and Mr. Kruse of that firm had obtained permission to sign the extension for the owner and for the charterer from Mr. Burns, the New York representative of the insurers for the owner and for the charterers. Mr. Burns had the authority from their principals to sign such extension in the regular course of their defense of cargo damage claims. Mr. Burns so testified on a deposition which was offered by the defendants into evidence of the trial of the case. The dismissal by the German Appeal court of that cause of action rendered its decision null and void.

Then counsel for the owner in the Norfolk suit was appointed by the same Mr. Burns. He argued that the judgment limiting the execution to the SEVERN RIVER was an "in rem" judgment according to German law and offered an affidavit by the same German counsel who represented the owner and charterers in the German courts,to that effect. Whereas the vessel was not a party to the suit in Germany nor was it in the custody of the court at any time, and the law of Germany is that when the liability against the owner is limited to a levy

against the vessel, and such levy could not be made, it may be changed to a judgment leaviable upon the general assets of the debtor. This action, too, was a fraud upon a court.

Then, in the New Jersey court, it has been explained how that court accepted the untrue claims of defense counsel of a time bar and res judicata; (an unpaid judgment cannot be res judicata). These untruths were advanced by officers of the court, lawyers appointed by the insurance companies, for the purpose of procuring the judgments in favor of the defendants. These consistent actions did prevent the collection of a claim admittedly valid, and cause this litigation to recover for the plaintiff. This action was started in August 1978, stating five causes of action, the fifth count being to recover damages in a plenary action in equity to set aside the previous judgments for fraud upon the court perpetrated by defendant's insurers, Newcastle Protection & Indemnity Association and London Steamship Owners Mutual Insurance Association Ltd. making themselves and their principals liable to plaintiff in fraud.

The five causes of action in this complaint were:

The First was the ordinary cargo damage claim against the joint tort-feesors, ship and charterer.

The second and third causes of action was against the insurers, for plaintiff to recover upon their separate policy of insurance to the charterers and owners as third party beneficiaries.

The fourth cause of action was on a written guarantee of Newcastle promising in exchange for a stay of execution on the German trial courts' judgment against charterers of June 15, 1971 for $64,018.05, to pay "pursuant to a final judgment of a German court". See A-1 et seq's Appendix.

The fifth cause of action was a detailed account of the foregoing actions of "Fraud upon the courts" seeking vacation and for the frauds of all defendants.

All counts but the fourth were dismissed on a motion under Rule 12(b) by the trial court. It said that the fourth cause of action was to be sent to trial, without a jury, on a question that was not theretofore raised in the pleadings. In ordering that cause to trial, the court said, "the guarantee was not due because the decision of the German Appellate Court was not reduced to judgment, and second, even if it has, Newcastle holds a valid lien on part of the award due Zack. Questions of fact and law are thus presented * * *."

Plaintiff objected to this issue, but the court ignored the objection. The defendants did not replead this counter-claim.

On the motion to dismiss, defendants stated without proof that Newcastle had a lien on the proceeds of the judgment in Germany on a lien against those monies against Zack. Neither of these claims were true. Plaintiff ordered proof concedely and admittedly copies of documents received from defendants' file, but the court ignored the proof. This finding of an issue without pleading was vio-

lative of constitutional due process.

At trial plaintiff proved the guarantee, the judgment appealed from of June 5, 1971, the affirmance as to the charterer by the decision of the appellate tribunal dated January 9, 1975 and the fraud committed upon the appellate court to obtain the dismissal as to the shipowner. The proof of the latter, consisted of letters passing between counsel and the defendants' insurers in preparation for the appeals, discussing the effort at making this claim because Mr. Kruse, the manager of the Oceanica Company of Canada at New York, had disappeared from the business scene and was not available for testimony in court. The trial court dismissed the fourth cause of action without prejudice saying that there was no question that the defendants Newcastle owed money to the plaintiff, but, it said that because there was no proof of the amount of a judgment entered in the German trial court upon the Appeal Court's decision it could not assess damages. It refused plaintiff's proof of the dismissals by a vote two to one. The minority would reverse because of fact questions raised on the fraud count and because the promise of Newcastle under its guarantee had accured on the handing down of the Appellate Court's decision of January 9, 1975.

The affirmance was a repeat of the decision of the trial court except that it changed that trial court's ground of dismissal of the fraud count that it had no jurisdiction since such a pending action would have to be brought in the court where the fraud was perpetrated, to one that plain-

tiff had lost its rights to complaint about the fraud when it did not attack that action in the court where it was committed. Both reasons are unlawful. They contradicted the decisions of this court and of other circuits. No authority or point was cited by either court on their respective reasons.

Also, on the trial of the fourth cause of action, the defendant offered no proof of an offset due Newcastle from Zack and no lien as it had claimed on the motion. Instead, out of caution, plaintiff showed that Newcastle had filed an attachment of the proceeds owed Zack on the German judgment on a claim of an offset arising from an assignment to Newcastle of Federal Insurance Company's rights against Zack. Plaintiff also produced the assignment and it read that Federal had assigned its rights to the charterers and shipowner and not to Newcastle. This was proof of fraud upon the court to prevent plaintiff from collecting on that judgment. At the same time, it proved that there was no valid lien in favor of Newcastle and no offset. This lack of proof was a defendants' lack of proof for it was defendants who had advanced the issue. And it was proof positive that there was no necessity to enter the judgment stated by the court for the guarantee plainly read that Newcastle would pay "pursuant to a decision" that had been made.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Because of its transcendental importance the failure of the District court to order the fourth cause of action to a trial by jury

requires summary reversal or the grant of the Writ. That cause of action was on a written contract of defendant, Newcastle that it would pay the sums plaintiff would be entitled to "pursuant to a final decision of a German court."* upon the appeal of the charterers from the trial court's judgment of June 15, 1971 for $64,018.05 to plaintiff, in exchange for plaintiff's promise to refrain from levying execution against the charterers pending appeal. Plaintiff clearly performed its promise in full. The decision on appeal was rendered but, Newcastle did not pay. That was a breach of the contract and such is the normal common-law action to recover money damages. Such causes of action are guaranteed a trial by jury under the Seventh Amendment which reads as follows:

> "In Suits at common-law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved * * *."

The plaintiff's demand for a jury was inscribed on the summons and complaint (p.1A appendix) which was served on defendants, the charterers and the shipowners, early in November 1980. On February 18, 1981, the court directed the fourth cause of action to be tried before it without a jury. This last provision was objected to by plaintiff but the court denied. The trial was commenced on April 1, 1981 by the court without a jury.

Ordering this claim to be tried without a jury even if the case stated multiple claims, one or more of which were claims to be tried without a jury, the court must nevertheless, preserve the jury trial. A district court must

*p. 83a of Appendix

be aware that the Supreme Court has passed on many cases holding that the jury trial shall be preserved on a common law cause of action. See Di Pinto v. Provident Security Life Ins. Co., 323 F.(2) 826; Beacon Theatres Co. v. Westover,359 U.S. 500; Dairy Queen Inc. v. Wood, 369 U.S. 469, and Ross v. Bernhard, 396 U.S. 531, 538-541. In Ross, the Supreme Court quoted from Beacon Theatres and Dairy Queen cases as saying;

> "Where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims."

It also stated "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action. See Simler v. Conner, 372 U.S. 221". These authorities state the Constitutional violation very well. Ignoring them was wrong and this court is respectfully asked to reverse summarily or to grant the writ.

2. As to the decision after trial of the fourth cause of action, that, too, is violative of the constitution, the due process clause found in the Fifth Amendment.

Simply put, the trial court said at the conclusion of plaintiff's case it would not award damages but would have to dismiss the count without prejudice, because "* * * it is apparent that something is owed to the plaintiff by the de-

fendants and of that there would be no question". The court then went on to say, p. A-53,

> "However this is a court of law. The guarantee speaks in terms of a final judgment, final decision and there has been no evidence submitted to this court as to what the amount of that final judgment is. It may well be that the determination of the Hanseatic Provincial Court is in fact a final judgment, but no evidence has been submitted and no briefs have been submitted and no German law has been submitted to substantiate that proposition."
> * * * grant the motion to dismiss for failure to establish the amount, the entry of or the amount of a final judgment in the German Courts." (A-53)

Note the single idea fixed in the court's mind is that proof had to be made of the final judgment including the fixation of costs in the trial court. Whereas, the guarantee has nothing to say of such an event, but as stated above the guarantee says it will pay pursuant to a final decision of a German court order.

Two arbitrary questions arise by such a finding.

a. The pleadings as written and not otherwise amended would require plaintiff to prove that the decision contemplated by the guarantee to accrue the promise to pay was that of the Appeal Court on the appeal from the judgment of the trial court dated June 15, 1971. The decision of the Appeal Court was the decision of January 9, 1975 for it dealt with the appeal for the judgment below. That plainly follows from a

reading of the guarantee itself, and, if an ambiguity arises, as the instrument was written and provided by the defendants, the interpretation must be that which favors plaintiff's interpretation. The minority opinion says so (A-75). Also see Williston on Contract, 3rd ed., Section 600A, at pp. 302-303 forbidding a court from adding words for a scrivenor to make the contract as he, at a trial, says was meant to do. See also Restatment of the Law, Contract, Sections 226, and 236, and Simpson on Contracts, 2nd ed., at p. 209 where the author states that it is a Primary Rule of Interpretation. Then Williston at Section 621 says that the first rule of the Secondary Rules is that the language will be contrued most strongly against the party writing it.

The court failed to read that the condition of payment was "a final decision of a German court" and not a final judgment after the costs had been ascertained and the final award of a judgment plus costs was entered. The costs could have been ascertained and judgment entered here, because the failure to pay under such an undertaking was a breach of contract, see Lent v. N.Y. & Maine R.R. Co., 130 N.Y. 501, 510 where the Court of Appeals speaking of when a contract to pay money on a condition is breached said that the breach occurs when the condition arises and there is a failure to pay. It added that the court must, if necessary, then go to the assessment of damages. It was plain error of the court to add the words "final judgment after costs are determined" to the

guarantee.

b. The district court further erred in using that terminology and placing the burden of proving that unlawful condition upon plaintiff rather than the defendant who in its brief on the motion to dismiss claimed that the condition was a part of the undertaking and that Newcastle had a lien for an offset upon the proceeds of the German judgment. The court then ordered a trial on the question of the lien on the offset, but it did not understand that defendants had not pleaded the offset and lien as a counterclaim (A-45), that no such issue could proceed to trial without amendment to the pleadings and that plaintiff objected to that kind of amendment without given it an opportunity to plead its views in defense to such a claim. See U.S. Industries v. Anderson, 579 F(2) 1223, where that court said that going to trial on an issue raised on a motion was unconstitutional as the party adversely affected had a right to be confronted with proper pleadings to establish the nature of the new issue to be tried, which would fix the burden of proof upon that issue. See also Randolph v. Foster, 3 E.D. Smith (N.Y.) 648. The trial court proceeded to lay the burden of proving upon plaintiff, to show that what defendant had claimed in a brief, was wrong. Even if the new issue raised by defendants should have been tried, plaintiff's burden was still the proof of the allegations of its complaint. This it did by proving the execution and delivery

of the undertaking, the judgment appealed from and the fact that the judgment was affirmed by a decision of the German Appeal Court. A most peculiar action was taken by the court when plaintiff had proven that the Appeal Court decision dated January 9, 1975 had affirmed the judgment appealed from. The plaintiff had read from an English translation of the German Appeal Court's decision, which was served upon plaintiff in the action in the New Jersey District Court by defendant. Plaintiff had marked it for identification only, as Exhibit 3. The court wanted plaintiff to place it in evidence. Plaintiff refused to do so. The court then said well, let's mark it as a court exhibit. Plaintiff objected, saying if the defendants want it in evidence, let them offer it. Plaintiff would object to it as not a valid judgment, since it had been obtained by fraud. Hilton v. Guyot explains the use of a judgment that is void for fraud as permitting the party defrauded to read facts that are admissions against the interest of the defrauded. Plaintiff had read what he needed out of it after marking it. Otherwise it was objectionable because not only was it an unsworn English version supplied by defendants but also because the judgment was null and void as obtained by "fraud upon the court". This claim plaintiff would have pleaded had the defendant's answer been amended. The court took the paper from plaintiff and personally handed it to the stenographer as its own exhibit, but he also told the stenographer to mark it as

Plaintiff's Exhibit 3. The facts of the plaintiff's claim of fraud upon the Appeal Court is stated in the "statement of the case" above. Though the fraud perpetrated had to do with the defendant's false claim that the extension of time to sue was void and the court accepted that false argument and caused the complaint to be dismissed as to the shipowner, yet, the fraud violated everything that was intended by that fraud, see Angerosa v. White, 248 App. Div. 429. In such circumstances plaintiff could object to the judgment as null and void, but it could read from it an admissions against defendants' interest, it found necessary, see Hilton v. Guyot, 159 U.S. 113, 199, 201. This rule would have been of invaluable aid to plaintiff's case as it could then object to that Appeal Court's reduction of the judgment to $33,000. That reduction was found by the German Courts upon its own reading of Cogsa, that 66 coils were found damaged. Cogsa is not read that way in this country. The rule is that the limitation of $500 per package is applied to the whole shipment and not to the packages damaged. At any rate, as a judgment obtained by fraud it is null and void, it is not enforceable, see Marshall v. Holmes, 141 U.S. 589, 62 S. Ct. 62, 35 L. ed. 870; Hilton v. Guyot, supra; 7 Moore's, Fed Practice, pp. 607, where it says that fraud renders a judgment a nullity, at p. 621, Moore repeats that rule; at p. 644 where he says that jurisdiction to nullify such a judgment is in any Federal Court, where personal jurisdiction

may be obtained; at p. 801, et seq., where he discusses the collateral attack upon a fruadulently obtained judgment. See also the following cases all dealing with fraud action brought in the Federal Courts, Gaines v. Fu'entes, 92 U.S. 10, 23 L. ed. 524; Griffith v. Bank of New York, 147 F.(2) 890 (CA2); Hume v. Scruggs, 94 U.S. 22; In re Murchison, 249 U.S. 123, 135; Chicago R.I. & P. Rwy. Co. v. Calicotte, 267 F. 799 and Publicker v. Shallcross, 106 F.(2) 946.

Because of this rule, plaintiff had proceeded expecting to prove the damages for the lack of the guarantee by proving the actual damages sufferd of $79,000 - 80,000. or of reverting to the judgment of June 15, 1971 appealed from of $64,018.05. This last, it was agrued, would be reverting to a judgment already decided upon the merits. The later but fraudulent judgment would be set aside, see the Civil Practice Law & Rules of New York, Section 5015(c) which permits reversion to the prior judgment. New York law would be applicable, anyway, because the contract of the parties to the carriage of goods says that delivery shall be at New York. The law of New York would be the place of performance and its laws would be applicable. The law of performance in contracts is where discharge is to take place; see Aquascutum v. SS. American Champion, (2 C.A.) 426 F.(2) 207, and Ingravallo v. Poole Shipping Co., (EDNY) 246 F. Supp. 334. It is well settled in Conflict of Laws that the place of performance is the law to be applied to

contracts, see Goodrich Conflict of Laws, p. 342, citing Scudder v. Union National Bank, 91 U.S. 406, 23 L. ed 245; see also Union National Bank v. Chapman, 169 N.Y. 538, and cases cited; and see Lorenzen, Cases on Conflict of Laws, at page 450, et seq. See also, Hall v. Cordell, 142 U.S. 116, 12 S. Ct. 154, 55 L. ed. 956, stating that the place of performance is the law applicable. Stumberg on Conflict of Laws, at p. 282 says the same principle is applicable, especially, it says, where a single act is the performance. Section 5015 CPLR is applicable. Not only does subdivision (3) eliminate the distinction between extrinsic and intrinsic fraud in all events where an attack is made upon a judgment so obtained, but subsection (c) grants the party defrauded the right to resort to a prior judgment as its remedy when the fraudulent judgment is nullified. This rule was briefed for the trial court but the trial court ignored it and the Court of Appeals ignored the error of the trial court. It was plain that both courts would not apply the rule of law to the proven facts of this case.

4. The dismissals of the four counts on the motion to dismiss (A-26) was erroneous because issues of fact were present, which if proven, would entitle plaintiff to a recovery. The motion was required to be denied. To determine the facts and not find if issues were present, is not only contrary to the Rule of 12(b), but also, to the cases of this court and of all

Circuit Courts in the land, for which reason the grant of dismissal denies plaintiff due process. In Edwards v. Kearsey, 96 U.S. 595, where at p. 604 the court quoted from its decision in Merchants Bank v. State Bank, 10 Wall. 604, and said "where the facts are undisputed, it is always the duty of the court to pronounce the legal result". Judge Sweet refused to fix the damages where plaintiff's prima facie case was rested on undisputed evidence. At page 607 of the Edwards case the court said regarding the impairment of contract rights; "the trust touching the subject in which this court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither misfeasance nor malfeasance on our part". These words are a far cry from the cavalier handling of the dismissals of this case by the trial court.

The Supreme Court recently followed the foregoing cases by their statement in Nebraska Free Press v. Stuart, 427 U.S. 539, saying; "due process requires that the trial be a fair and impartial one". The judiciary is required to stay within the bounds of its constitutional powers, see ACL v. Watson, 327 U.S. 582, and, it may not disregard the existing rights of litigants, see U.S. v. Alleghany County, 322 U.S. 174, 189, 191. Where creditability and the weight of the statements of the opposing party are in balance, summary judgment may not be granted, see Sartor v. Arkansas, 321 U.S. 620. The court in Sartor said a court "may not withdraw witnesses from cross-examination,

the best method yet devised for testing the trustworthiness of evidence". In Schoenbaum v. Firstbrook, 405 F.(2) 200, reh. p. 215, (CA (2), 1968) is a case having issues closely allied to the issues in the case at bar. Certiorari was denied sub nom Manly v. Schoenbaum, 395 U.S. 906, 89 S. Ct. 1747, 23 L. ed. (2) 219.

Poller v. Columbia Broadcasting Co., 368 U.S. 464 upholds the right to a trial of a claim, except when there is complete absence of any significant probative evidence tending to support the complaint. This is something which Judge Sweet did not do. The plaintiff's asertion to an estoppel to prevent the application of the time-bar to dismiss the first three causes is an example. This case should have stayed the trial judge from ordering a judgment for defendants. The Brinkerhoff-Farris case supra at pp. 681 and 682 deserves reading. The well intentioned Mr. Justice Brandeis talks on due process and the deprivation of it by the judiciary. In Rochen v. Calif., 362 U.S. 162, Frankfurter J., quotes Cardoza J., on due process saying it is a guarantee of respect for those personal immunities which are "so rooted in the traditions and in the conscience of our people as to be ranked as fundamental", see Snyder v. Mass, 291 U.S. 97. Also in Hurtado v. U.S., 410 U.S. 578, the court declared that the failure to follow this statute violates the constitution, and, Carter v. Stanton, 405 U.S. 669 and Adikes v. S. H. Kress Co., 398 U.S. 144 at 157.

It was said by the late Chief-Judge Clarke of this Circuit in Dioguardi v. Durning, 139 F.(2) 774, where Judge Clarke struggled with a pro se complaint and found in the facts a wrong by the New York Port Collector that could be redressed. He reversed the dismissal. He wrote, "giving the plaintiff the benefit of the reasonable intendments in his allegations that he was actually the first bidder at the price for which they were 'sold' stated the wrongful act of the defendant." The honorable court explained:

> "But as it stands, we do not see how his day in court to show what obviously he so firmly believes and what for present purposes must be taken as admitted" could be denied.

Our Supreme Court by Mr. Justice Holmes said that to dismiss, the court must find "the complaint frivolous". Hart v. B.F. Keith Vaudeville Exchange, 262 U.S. 271, 274, 43 S. Ct. 540, 89 L. ed. 977. See also Radovich v. National Football League, 352 U.S. 445, 77 S. Ct. 390, 1 L. ed. (2) 820. In Conley v. Gibson, 355 U.S. 41, the court said that there can be no dismissal where it is not clear beyond a reasonable doubt that plaintiff will be unable to prove a right to relief.

Moore's Fed. Prac., 2nd ed., ¶12.08 at p. 2267 states:

> "But a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in

support of them. Pleadings are to be liberally construed. Mere vagueness, or lack of detail is not ground for a motion to dismiss."

Again, the Supreme Court elaborated in Gardener v. Toilet Goods Association, 387 U.S. 167, at page 187; where at issue was the need for enforcement of the review proceedings residing in any agency:

> "There is, of course, no abstract mechanical method for determining the adequacy of review provisions. Where personal status or liberties are involved, the courts may well insist upon a considerable ease of checking administrative orders or regulations."

And at p. 192, the Court went on to say:

> "We cannot say on this record that the burden of such a course is other than substantially accepting, as we must on a motion to dismiss on the pleadings, the allegations of the complaint and the supporting affidavits as true."

This was one of three cases where the Court was divided, the majority held for the importance of a trial to resolve the issues where time was a consideration.

Again the Supreme Court had said in Walker Process Equipment v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. ed.(2) 247, at p. 349 of the S. Ct. report:

> "As the case reaches us, the allegations of the counterclaim, as to the practiced fraud upon the government by Food Machinery as well as the resulting damages suffered by Walker are taken as true."

citing U.S. v. New Wrinkle, Inc., 342 U.S. 371, 72 S. Ct. 350, 352, 96 L. ed. 417 (also concerned with allegations of fraud).

5. The dismissal of four causes of action may be considered in two parts. The first encompasses the first, second and third cause of action (A-5 to A-9), but as the second and third follow the first, as they are suits in which plaintiff seeks to hold the insurers to their contract of insurance for the charterers and shipowner, so that the actions against the insurers would have to be reinstated if the first is found wrongfully dismissed. The first cause of action is against the carriers, charterers and shipowner. The dismissal was placed upon Cogsa's limitation that a suit upon a claim against them should be brought within one year after delivery (A-33 to A-38). The delivery was made on February 16, 1960. One year after that is February 15, 1961. The limitation reads 46 U.S.C. Section 1303(b).

> "* * * The carrier and the ship shall be discharged from, all liability in respect of loss or damage unless suit is brought within one year after delivery * * *."

A suit was brought for this loss or damage in the Federal District Court of the Southern District of New York on February 11, 1961. That was before the one year period of Cogsa. Query? Doesn't the commencement of that suit extinguish the incipient right of the carriers to that limitation?

It is noteworthy that the Statute does not compel a suit or the carrier may claim the time-bar, but it creates a right to claim the operation of the bar on the particular claim. May the bar be nullfied if a suit, any suit, is brought before a year elapses from delivery, or, does the bar continue to any case started at any time after the one year period. No case has been decided on this point. The cases cited by the District Court and repeated by the Court of Appeals are cases where the first suit was brought after the expiration of the one year, and of course, no one would quarrel with that. But here four suits were brought before the expiration of the year and the additional time to May 15, 1961 as stipulated. It is important to note that the Statute is talking about a single shipment that has suffered loss or damage.

It would be well if Cogsa is looked at to see what it really means and not resort to name calling as was done by the majority opinion (A-66), saying plaintiff's analysis was frivolous. Resort to grammar will reveal its meaning very well. We find that the subject of that clause is that the carrier will be discharged from liability for loss or damage. Then the next word is "unless". The word "unless" is to effect what purpose? Isn't it to affect the right of the carrier to a time bar? That is what it says. "Unless" is a conjunction meaning according to Webster's Dictionary, "if not, except, when, except that". Applying these synonyms to the Statute and we find that the words

after "unless suit is brought within one year" means that the right will attach if the suit is not brought within one year or except or when the suit is not brought within one year. Again one cannot say that the Statute says that any suit on a claim that is not started within one year but is brought beyond the one year period would be barred. In fact, it says if a suit is brought upon a particular claim within one year, the right does not arise.

Volume 51 of Am. Jur., 2nd, Limitation of Actions, Section 15, states that the Statute of limitation of actions existing at common law had to be strictly contrued. They are not like the limitations in the Suits in Admiralty Act which also creates the right of actions. There are even cases which have permitted a second suit after the first has stopped the running of Cogsa's limitation, see Internatio & Rotterdam Inc. v. Thomsen, 218 F.(2) 218; U.N.R.R.A. v. S.S. Mormacmail, 199 F. Supp. 552; Ore Steamship Co. v. Hassel, 137 F.(2) 328. Also Chief Judge Clarke who decided the Ore Steamship Co. case stated in M.W. Zack Metal Co. v. Birmingham City, 291 F.(2) 451, that a timely started suit even if plaintiff had not yet perfected its title to the goods, prevented the claim for a bar from arising. The emphasis is on the fact that Cogsa talks about loss or damage to a shipment under a bill of lading so that when a suit is started, the limitation never

arises. This obvious reading of Cogsa was denominated frivilous by a Court of Appeals, apparently unwilling to understand.

But there is a question of fact which is also involved which would defeat Cogsa's limitation even if it were not defeated by the timely brought suit. That is where estoppel would arise where the actions of the carriers had fraudulently prevented the previously started suits to be tried on the merits. The courts below did not discuss this form of estoppel. Instead, the district court contended itself with declaring, generally, but no estoppel had arisen. Yet, if plaintiff's claims of facts were to be presented on a trial and they were proven, it would be entitled to a recovery. Consequently, it cannot be said that it appears to a certainty that plaintiff was not entitled to any relief.

6. The fifth cause of action is for fraud perpetrated upon the courts in these proceeding actions (A-12 et seq.). These frauds occurred in obtaining the December 7, 1971 judgment in the German trial court. That court had rendered a judgment against the shipowner for $64,018.05 but limited execution to a levy upon the "SEVERN RIVER" saying that the vessel was then sailing the high seas. Such a limitation was possible under German law. Even, as here, the suit was an in person suit against the owner and the vessel had never been seized and was never in the custody of the court.

Such a judgment may be amended on motion if it would appear that the vessel was not amenable to execution, in which case, the court would permit an execution upon the general assets of the judgment debtor.

Then in the German Appeal Court, defense counsel and the insurers of defendants agreed that counsel should advance the argument that the extension of suit time to May 15, 1971, though signed by an agent at New York who represented both the charterer and shipowner, had no authority to sign for the shipowner. Consequently, under the German Commercial Code, the suit would be subject to dismissal for untimeliness, and the appeal court was induced to dismiss the suit as against the shipowner. That unlawful action was proven by the correspondence of the insurers with their agent in Hamburg and as so proven, that proof could not be disregarded. The actions of defense counsel was also proven to be false by defendants' correspondence that they had investigated the question in 1961, and found that the extension was a valid and binding extension on the owner because the agent had taken the precaution to get the authority of Mr. Burns, the New York agent of the owner's insurer, who was conducting the defense of the claim even since the damage was discovered on shipboard on February 10, 1962. Also in a deposition taken of Mr. Burns, by the defendants, Exhibits B on the trial, Mr. Burns had admitted that the extension was valid and binding on the owner because he had

given the ship's agent at New York that authority.

Then, in a suit commenced in April 1972, at Norfolk, where a sister-ship of the SEVERN RIVER had been arrested in admiralty, on a complaint stating the original cargo damage claim plus allegations of the judgment of December 7, 1971, the shipowner, by counsel employed by the same Mr. Burns, agent for the insurer, moved to quash the service of process. In some way, that motion was transformed, without notice, by simply filing claims to reasons for dismissal as on a summary judgment. Plaintiff objected and wanted an opportunity to obtain the record made at the trial court in Germany. That claim was ignored. The defendant claimed res judicata, bar of Cogsa, another action was pending, and that the judgment of December 7, 1971 was "in rem" judgment. He concluded that the complaint against the owner could not rest an "in rem" judgment. Defense counsel for the insurers offered an affidavit signed by defendant's counsel in Germany which stated that it was the law of Germany that the judgment of December 7. 1971 was the same as an "in rem" judgment in the United States.

The district court adopted all four grounds for dismissal, but its opinion was not published. The Court of Appeals affirmed on two of the grounds only; that of time-bar and that of the judgment being an "in rem" judgment. Almost simultaneously with this decision, the Court of Appeals published its

decision of January 9, 1975. That decision affirmed the June 15, 1971 judgment against the charterers that had been appealed but reduced the recovery to $33,000 finding that amount because only 66 of 93 coils had been damaged. It relied upon Cogsa's limitation of $500 per package, but in America that limitation to $500 per package applies to the whole shipment and not to the number of packages damaged. Also as stated above, it dismissed the suit against the shipowner.

Plaintiff moved the Court of Appeals for re-argument submitting a copy of that January 9, 1975 decision. The Court of Appeals had been advised that, by case law, the time-bar of Cogsa was not effected in that suit because the prior filed suits in New York's Southern and Eastern districts and in Germany, and in New Jersey, had defeated the defendants' rights to claim the bar. As to the dismissal by reason of the German judgment being an "in rem" judgment, the court was asked to hold that was rendered moot by the appeal court. The Court of Appeals agreed with the time-bar argument and withdrew that as ground for dismissal. But as to seeking to send the case back to the district court for trial, it states that plaintiff had declared on the judgment of December 7, 1971, and it could not now change to the original cause. Why? It did not say. Certiorari was denied by this court.

Then in 1976, plaintiff went to the District Court of New Jersey where that suit had been dismissed for lack of prosecution with-

out prejudice. Plaintiff sought to restore that case as against both ocean carriers and to substitute the shipowner for the vessel. The court suggested that plaintiff bring in the owner. The motion papers were sent to a known agent of the owner at Baltimore, Tidewater Commercial Corporation, and requested that they appear. They sent the papers to the same Mr. Burns, their insurer's agent, for handling. Mr. Burns employed Newwark counsel. That counsel appeared for the owner but his opposing papers argued for both carriers. The grounds of opposition were that the case was time-barred and res judicata by reason of the German appeal court judgment. He even denied that the owner had once had knowledge of the pendency of that suit in New Jersey. Plaintiff swore to the fact that Mr. Burns was advised of the start of that suit, when in 1961, anticipating a request for a further extension than May 15, 1961, plaintiff refused the proffered extension, because suits been started in Germany, in the New Jersey and in the Eastern District Court. Also, the court was advised the time-bar claim had already been decided by the Court of Appeals, Fourth Circuit, against defendants. Also, there was no question but that the start of the New Jersey suit was May 12, 1961. As to res judicata that was not a lawful defense because it had been obtained by fraud and it remained unpaid and was not effective as res judicata, see Hilton v. Guyot, 159 U.S. 113.

All these matters are recited in

the complaint. Additionally, plaintiff produced in opposition to the motion to dismiss defendant's correspondence relating to the fraud upon the German appeal court. Also plaintiff produced correcpondence and documents received from defendants' files proving that the claims of defense counsel made in this action that Newcastle had a lien on an offset against the proceeds of the German judgment payable to Zack were untrue. The truth was shown to be an attachment filed on a claim of monies owed to Newcastle under an assignment by Federal Insurance Company which when examined, showed the assignment was not to Newcastle but to the shipowner and charterers. These were Exhibits 13 and 14 at the trial.

The facts of these frauds if proven at the trial would entitle plaintiff to a decision directing that these judgments were null and void and to damages by the effort to correct the fraud, see Universal Oil Producing Co. v. Root Refining Co., 328 U.S. 578.

The trial court dismissed this count without reaching the merits. It said at p. A-43, these frauds were to be prosecuted to the courts where they were perpetrated,not in the district court. This is not the law, see Hilton v. Guyot, supra, which was a case originating in the New York District Court and sought to set aside a judgment made in France, for fraud. This court did set aside that judgment. In Griffiths v. Bank of New York, supra, Judge Clarke held for jurisdiction in a suit where the fraud

had been perpetrated upon the court of New York. Then the court below sought to say that extrinsic fraud would defeat the action, but it did not undertake to say that these frauds were not extrinsic frauds. At p. A-44, the trial court states the theory that plaintiff was obliged to meet the fraudulent action at the time when committed, and when it was not made, plaintiff had waived it. But the cases cited do not so hold and there is no such law. In fact, Marshall v. Holmes, 141 U.S. 589 and Hazel Atlas v. The Hartford Company, 322 U.S. 238 are examples of the law that permitted the action for fraud to be brought any time, it was not subject to any time limitation. It was a wrong, a defilement of the administration of justice, Mr. Justice Black said, in Hazel-Atlas. The Court of Appeals imitated the district court despite the submission of many cases in support of the rule that a claim of "fraud upon a court" is rarely suspectible of dismissal on motion because the element of intent to defraud is a triable issue.

The power to vacate a judgment obtained by fraud is an inherent power of the courts, see Universal Oil Products Co. v. Root Ref. Co., supra. Also the court does not have to wait for a party to bring the fraud to its attention, it may move, sua sponte, see Mr. Justice Black's comments in Hazel-Atlas. A decision produced by a fraud "is not in essence a decision at all", see Kenner v. Comm. of Int. Rev., CA7th, 1968, 387 F.(2) 689, c.d. 393 U.S. 841, 89 S. St. 121,

21 L. ed.(2) 112. The case where the use of prejury was planned, held to be a fraud upon the court, see Hodge v. Huff, 140 F.(2) 686-688; In re Murchison, 249 U.S. 123, 136; Burbrook Mfg. Co. v. St. George Textile Corp., 283 App. Div. 640, (Mr. Justice Breitel); Ross v. Preston, 292 N.Y. 456; Verplanck v. Van Bureg, 76 N.Y. 247; Publicker v. Shallcross, 106 F.(2) 949; Griffith v. Bank of New York, 147 F.(2) 899; Chicago R.S. & R. Rwy. Co. v. Colicotte, 267 F. 799, Marshall v. Holmes, 141 U.S. 589 and Hilton v. Guyot, 159 U.S. 113, the latter talking of a foreign judgment having been obtained by fraud.

Both Moore, Fed. Practice, at Vol. 7, p. 607 and Wright & Miller at Vol. 11, par. 2870, pp. 247-248 say that fraud upon a court renders the decision a nullity. Both authors explained that fraud upon a court is in a different category because it is an act of an officer of the court which induces the court to accept the fraudulent statements of fact to the injury of justice and the litigant; see Moore at p. 513, both cite Sutter v. Easterly, 354 Mo. 282, 162 A.L.R. 437, Great Coastal Express Inc. v. International Brotherhood of Teamsters, 86 F.R.D. 137.

The Fifth Amendment reads in pertinent part:

> "No person had * * * be deprived of life liberty or property without due process of law"

Due process is required of our courts,

Brinkerhoff-Faris v. Hill, 281 U.S. 623, 681. Where a court's errors are so arbitrary or are a capricious exercise of power or is in clear conflict with those principles which have been established in our system of juries-prudence, the supervisory powers of this court are called upon, see Bowie v. Columbia, 378 U.S. 347. Pointer v. Texas, 380 U.S. 400, and Rochin v. California, 342 U.S. 165, 12 A.L.R.(2) 1396. The courts below failed to follow these and the rule of Conley v. Gibson, 355 U.S. 41, stating that a trial is a search for the truth.

7. The majority does not, like the district court, cite any applicable law to support the dismissals. They failed to sift the fact claims to reach the bottom line, what are the true facts. They are that plaintiff is owed money and the law says they are entitled to be paid. Why then do they show so much antipathy towards plaintiff. The majority calls plaintiff's efforts scatter-gun attacks, not a fight for the truth. It does not,however, say that the plaintiff's attack was not sound. Even its opening sentence is a forerunner of its antipathy but it is untrue and has no support in the facts for a useless waste of the court's time. It assumes that plaintiff has "consumed an inordinate amount of the resources of courts in this country and abroad". The short answer to that is why didn't they allow the recovery that plaintiff was entitled to, instead of doing a lot of talking about things not really dispositive by the logic of the facts.

The supervisory powers of this court ought once more be used to reassert justice in the Federal Courts, be rectifying the errors below. They show, in the decisions, in bold relief, a plaintiff, in a two decade search for truth being turned back by words avoiding the facts under the guise of defense that were not applicable to the facts, nor were they authorised in law. In Stoll v. Gottlieb, 305 U.S. 165, 171, Mr. Justice Reed said that such actions were unconstitutional.

It surpasses common sense that a court would find that the defendants owed money but they were excused from paying it. While the constitution makes sense, the decisions below do not. They even misread the words of a plain contract to say 'no'. Then about fraud, the trial court did not say that the facts alleged were not fraudulent but it relied on words of alleged defense which have no authority in law to refuse to try the facts. The majority opinion said the frauds were not extrinsic. The court was apparently not familiar with the defination. Mr. Justice Black in the Hazel-Atlas case was satisfied to say that inducing the court to act on the basis of false facts submitted by a lawyer was fraud upon the court; but if it has to consider whether extrinsic or intrinsic, he said, it was extrinsic because it had been planned. Judge Breitel in Burbrook, supra, defined extrinsic fraud clearly as a plan to use prejury in the courts.

Also, the absolute refusal of the trial court to consider any claim of fraud upon the court, caused him to avoid reference to any description of the falsehoods being uttered by defense counsel and at the trial he ordered counsel to refrain from producing the proof. Also, he curtailed discovery proceedings refusing to hear of complaints of what defense counsel had done to frustrate discovery. This is contrary to Hickman v. Taylor, 329 U.S. 495, Schlaugenhauf v. Holder, 379 U.S. 104, 114, 115; and Harbert v. Lando, 441 U.S. 153.

The minority exposes the defendants as the cause of plaintiff's travail, see the last paragraph of that opinion, p. A-79. That tells of an incident that epitomizes how much was the effort at exposing the frauds to unbelieving jurists, was maligned. Yet, see 11 Wright & Miller, Fed. Prac., Section 2870 and 7 Moore's, Fed. Prac., in his chapter on fraud upon the court because both treat of the Hazel-Atlas case as words cleansing a cancer in the courts. Moore also discusses United States v.Throckmorton, saying that this court should scrintinize it on the strength of Marshall v. Holmes, but,there is distinction between the two that might be stressed. The fraud in Throckmorton was perpetrated by a non-lawyer.

Also, the Second Circuit seems hesitant to treat with frauds on the court. See Serzysko v. Chase Manhattan Bank, 461 F.(2) 669 and Kupferrnan v. Consolidated Research, 459 F.

(2) 1072. Not so the First Circuit where the court comes out, unhesitantly, to say it will use its inherent power, in Greater Boston Tel. Corp. v. F.C.C., 463 F.(2) 768.

A word from this court would perhaps cure the cancer of "Fraud upon the Court" if only to maintain the integrity of the courts. While this would help Zack, the ast bulk of the thousands of litigants seeking justice in our courts would be protected against the problem of creditability that has faced Zack. That brings up one last point. If this court reverses, it would not be fair to send this case back to Judge Sweet. Section 1455a of 28 U.S.C. provides the remedy where a trial judge has acted in such a way as to call his impartiality into doubt.

WHEREFORE, it is respectfully asked that the jury problem might be treated summarily, but if not the petition ought to be granted. The facts of the Fourth Cause of Action demands a review. Also, the dismissal of the other causes are palpable violative of due process and this writ should be granted for a review of that problem.

Anthony B. Cataldo

ANTHONY B. CATALDO
Attorney for Petitioner

82-525

Office - Supreme Court, U.S.
FILED
SEP 2 1982
ALEXANDER L. STEVAS,
CLERK

THE SUPREME COURT OF THE UNITED STATES

M. W. ZACK METAL CO.,
Plaintiff-Appellant-Cross-Appellee,

-against-

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE, HANS H. JANSEN, JURGEN N. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP MUTUAL INSURANCE ASSOCIATION LIMITED,
Defendant-Appellees,

-and-

NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED,
Defendants-Appellees-Cross-Appellants.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ANTHONY B. CATALDO
Attorney for Petitioner
Office & P.O. Address:
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New York, N.Y. 10007
(212) 962-0965

TO: HILL, RIVKINS, CAREY, LOESBERG, O'BRIEN & MULROY, ESQS.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

M.W. ZACK METAL COMPANY,

Plaintiff,

-against-

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE, HANS H. JANSEN, JURGEN K. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED,

Defendants.

----------x

SUMMONS

Plaintiff demands Trial by Jury

To the above named Defendants:

You are hereby summoned and required to serve upon

ANTHONY B. CATALDO,

plaintiff's attorney, whose address is

111 Broadway
New York, New York 10006

an answer to the complaint which is herewith served upon you within 20 days after service of this summons upon you exclusive of the day

of service. If you fail to do so, judgment by default will be taken against you for the

RAYMOND F. BURGHART
Clerk of Court.

Deputy Clerk

Date: June 29, 1978. (Seal of Court)

NOTE:-This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

SAME CAPTION COMPLAINT

The Plaintiff, M.W. ZACK METAL CO., by its attorney, ANTHONY B. CATALDO, complaining of the defendants, respectfully alleges as follows;

First: The Plaintiff is a corporation duly organized under the laws of the State of Michigan with a principal place of business at Detroit, Michigan.

Second: That upon information and belief the Defendant, the International Navigation Corporation of Monrovia Liberia, is a corporation organized under laws of the Republic

of Liberia but having an office and principal place of business at Baltimore, Maryland, and at all times hereinafter mentioned, was the owner of the Steamship Severn River, which was employed in international trade as a cargo carrying vesel.

Third: That the defendants, Hans H. Jansen and Jurgen K. Krafft, were partners, operating and doing business as Jansen & Co., in the City of Hamburg, Republic of West Germany, which partnership was as charterer of the SS Severn River; that the defendant, Contam Linie, was the trade name used by Jansen & Co. to do business within the State of New York to represent the interests of vessel owners and charterers respectively for vessels chartered by Jansen & Co.

Fourth: That the defendant, Newcastle Protection and Indemnity Association has its principal place of business in Liverpool, England is an insurance group or association consisting of charterers of steamships, owners of ships and other firms in the maritime business in the form of a mutual association of insuring their members for their liabilities and responsibilities incurred in the operation of their several businesses.

Fifth: The defendant, The London Steamship Owner's Mutual Insurance Co. Ltd., is a corporation with its principal place of business in London, England, insuring steamship owners for their various liabilities arising from their operations, among them, for liabilities and responsibilities for cargo damage for cargo placed on board vessels of said owners.

Sixth: That the said Newcastle Protection and Indemnity Association did insure Hans H. Jansen, Jurgen K. Krafft, and or Jansen & Co., and Contam Linie for their liabilities as charterers of the Severn River during the times hereinafter mentioned and the London Steamship Owner's Mutual Insurance Association Ltd., did insure the International Navigation Corporation of Monrovia, Liberia, against its liabilities as the owner of the SS Severn River, among other risks, for injury to cargo placed on board the said SS Severn River as hereinafter mentioned, and that all times hereinafter mentioned, La Morte Burn & Co. Inc., was a New York corporation, having an office and principal place of business in the City and County of New York, and was the agent and representative in the United States of all the defendants above mentioned, in respect of the matters hereinafter mentioned and described.

As and for a First Cause of Action, Plaintiff respectfully alleges:

Seventh: That in the month of January 1960, the plaintiff was the owner of 93 coils of hot rolled steel sheets then in transit from Europe to New York and it caused said 93 coils to be delivered to the SS Severn River at the port of Antwerp, Belgium, for such transport.

Eighth: That the said 93 coils of hot rolled steel sheets were received by and placed on board the SS Severn River and the same were loaded aboard by the said SS Severn River in good order and condition for delivery to the plaintiff, or its agents in pursuance of a bill of lading which was numbered 35, a true copy of which is attached hereto, and which bill of lading provided among other conditions, that the charterers and owners of the vessel shall carry plaintiff's steel to the port of New York and there discharge the said coils in the same good order and condition as when the said steel was placed on board the SS Severn River.

Ninth: That said 93 coils of steel were stowed on board said vessel and carried to the port of New York and were fully discharged on the 16th day of February, 1960, but not in the same good order and condition as when received, but instead, at its discharge the said steel was in seriously damaged condition by contact

with the ships sides, its equipment and other substances unknown to the plaintiff.

Tenth: By reason of the premises aforesaid, plaintiff's steel sustained damages of $79,723.74 no part of which has been paid although duly demanded.

Eleventh: That plaintiff duly performed all of the conditions upon its part to be performed under the terms of the bill of lading and there is now due and owing plaintiff from the the defendants, the International Navigation Corporation of Monrovia, Liberia, Jansen & Co., Hans H. Jansen, Jurgen K. Krafft, and Contam Linie, the said sum of $79,723.74 with interest thereon from the 16th day of February, 1961, together with the costs and disbursements of this action.

As and for a Second Cause of Action,

Plaintiff respectfully alleges:

Twelfth: That during the carriage of plaintiff's coils of steel aforementioned from Antwerp, Belgium to the port of New York, the defendant, Newcastle Protection and Indemnity Association agreed to insure and to pay for the liability of the defendants Jansen & Co., Hans H. Jansen, Jurgen K. Krafft, and Contam Linie for any damage occurring to said coils of steel during said transit from Antwerp, Belgium to the port of New York.

Thirteenth: That said coils of steel were seriously damaged during their said transit and were dischargd from the vessel damaged as above mentioned, and defendants Jansen & Co., Hans H. Jansen, Jurgen K. Krafft, and Contam Linie together with their insurer, Newcastle Protection & Indemnity Association, became responsible for the said damage and were rendered liable by reason thereof and plaintiff became entitled to be paid therefor.

Fourteenth: That due demand was made upon said Jansen & Co., Hans H. Jansen, Jurgen K. Krafft, Contam Linie and Newcastle Protection and Indemnity Association for the payment of the damage to plaintiff's steel as hereinabove mentioned, but said defendants have failed to or have refused to pay plaintiff therefor, and said defendants are liable to plaintiff for the sum of $79,723.74 together with interest from February 16, 1960, together with the costs and disbursements in this action.

As and for a Third Cause of Action,

Plaintiff alleges:

Fifteenth: That during the carriage of plaintiff's coils of steel aforementioned from Antwerp, Belgium, to the port of New York, the defendant, The London Steamship Owner's Mutual Insurance Association Ltd. did agree to insure and to pay for the liability of the defendant,

International Navigaion Corporation of Monrovia, Liberia, and its vessel, SS Severn River, for any damage occurring to said coils of steel during its transit from Antwerp, Belgium to the port of New York.

Sixteenth: That plaintiff's said coils of steel were seriously damaged during their said transit and they were discharged from the vessel, in damaged condition as mentioned above and the defendants, the International Navigation Corporation of Monrovia, Liberia, and The London Steamship Owner's Mutual Insurance Association Ltd.became responsible for the said damages and were rendered liable to plaintiff by reason of said damages and plaintiff became entitled to be paid therefor.

Seventeenth: That due demand has been made upon both the International Navigation Corporation of Monrovia, Liberia, and The London Steamship Owner's Mutual Insurance Association Ltd., for the payment of said damages to the plaintiff's steel as hereinabove mentioned, but said defendants have failed or refused to pay plaintiff therefor and the said defendants are liable to the plaintiff for the sum of $79,723.74 together with interest thereon from February 16, 1961, together with the costs and disbursements of this action.

As and for a Fourth Cause of Action,
Plaintiff alleges:

Eighteenth: That on or about the 27th day of January 1961, all defendants hereinabove mentioned by their officers, agents or employees did lawfully consent to an extension of time to sue for the damage to plaintiff's 93 coils of hot rolled steel sheets mentioned above, until May 15, 1961.

Nineteenth: That despite such extension of time to sue, and on or about the 11th day of February, 1961 a suit was duly commenced in this court by plaintiff against the SS Severn River, Jansen & Co., Contam Linie and Hans H. Jansen, to recover for the damage to plaintiff's steel mentioned and described as above but the said suit was dismissed, not on the merits, but without a trial of the issues thereof.

Twentieth: That on or about the 12th day of May 1961, a suit was duly commenced in the District Court for the District of New Jersey, by plaintiff against the SS Severn River, and her charterers, Jansen & Co., Hans H. Jansen, and Contam Linie, to recover for the damage done to plaintiff's steel mentioned and described as above but the same was dismissed, not on the merits and without a trial of the issues thereof.

Twenty-first: That on or about the 13th day of May 1961, a suit was duly commenced in

the Hamburg County Court for Commercial Affairs of Hamburg, Germany, by plaintiff against the aforementioned charterers, Jansen & Co., Hans H. Jansen, Jurgen K. Krafft, and Contam Linie, and the owner of the carrying vessel, the International Navigation Corporation of Monrovia, Liberia, to recover for the damage to plaintiff's steel mentioned and described as above and the said charterers and owner appeared in said suit by a single counsel, jointly employed by defendants-insurers, Newcastle Protection and Indemnity Association and The London Steamship Owner's Mutual Insurance Association Ltd., who proceeded to defend the interests of all defendants therein mentioned; that a judgment or judgments were made and entered in said court in Hamburg, Germany decreeing and adjudging the charterers and owners of the Severn River to be liable to the plaintiff for damages, costs and disbursements, and interest.

Twenty-second: That the charterers and owners of the Severn River and their insurers, Newcastle Protection and Indemnity Association, caused an appeal to be entered in the Hanseatic Provincial Court of Appeals, to review such judgments entered against the charterers and owners in the Hamburg County court as mentioned above.

Twenty-third: That in order to stay exec-

ution upon the charterers upon the said judgment or judgments, their insurer, Newcastle, agreed to and did guarantee in writing, payment of any judgment or part thereof as may be affirmed by the appeal court.

Twenty-fourth: That on or about the 9th day of January 1975, the said Appeal Court made its decision to affirm the judgment or judgments of the trial court in Germany, against the charter aforesaid, but for the reduced amount of $33,000. with interest and costs and disbursements against the charterers, but dismissed the suit as against the ship owner, International Navigation Corporation of Monrovia, Liberia, for the stated reason that the commencement of the suit on the 13th day of May 1961, had become time-barred by operation of Sections 901 and 902 of the German Commercial Code.

Twenty-fifth: That due demand has been made of the charterers and their guarantor, the Newcastle Protection and Indemnity Association for the payment of the judgments so affirmed, but said guarantor has failed or refused to pay the same and it has breached its written agreemnt of payment thereof, in consequence of which breach, the defendant Newcastle Protection and Indemnity Association is liable to plaintiff for the sum of $110,000. no part of which has been paid although duly demanded

and said sum of $110,000. is still due and owing to plaintiff together with interest thereon from the 9th day of January 1975, and the costs and disbursements of this action.

As and for the Fifth Cause of Action, Plaintiff alleges:

Twenty-sixth: That on or about January 27, 1960, the plaintiff filed a claim against the charterers and the owner of the SS Severn River, as carriers of the plaintiff's 93 coils of hot rolled steel aformentioned, with Contam Linie, their agent at New York, accompanied with shipper's invoice and bill of lading and shortly thereafter the firm of La Morte Burns & Co. Inc., of 2 World Trade Center, New York, N.Y., the United States representive of the English insurers of the ocean carriers undertook to negotiate the claim for cargo damage and there ensued extensive negotiations with said Lo Morte Burns & Co., representing said insurers of said liability for cargo damage.

Twenty-seventh: That said negotiations proved to be futile whereupon plaintiff commenced the suits above mentioned to insure a recovery for the damage done to the 93 coils of hot rolled steel belonging to the plaintiff.

Twenty-eighth: That at no time were said negotiations conducted with the charterers or the owners or anyone representing their in-

terests were carried on only at the specific request of and with the insurers of the charterers and the ship owner, who acted at all times in their own interest to reduce or defeat plaintiff's claim for indemnity.

Twenty-ninth: That after the commencement of the suits above mentioned the only one appearing in interest to defend such suits were counsel employed by said insurers of cargo damage as aforementioned, and the prosecution of the defense to such suits were inescapbly for the sole benefit of said insurers of the charterers and the owner of the vessel SS Severn River.

Thirtieth: That within the suit in the Hamburg County Court, the defendant-insurers named above caused false statements of facts to be advanced to that court for the purpose of deceiving it into limiting any recovery for the plaintiff or to defeatit altogether, by alleging that the extension of time referred to in paragraph "eighteenth" hereof, was not granted with any intention that plaintiff shall rely thereon to bring suit after February 16, 1961, and by alleging further that if a judgment were to be rendered against the defendant, International Navigation Corporation of Monrovia, Liberia, that its execution should be limited to a levy upon the vessel because she was then

sailing the high seas.

Thirty-first: That the Hamburg County Court did render its judgment of December 7, 1971, by which it held the defendant, International Navigation Corporation of monrovia, Liberia, liable for the damage to the cargo, but limited the judgment rendered to an execution against the SS Severn River, because it was then sailing the high seas.

Thirty-second: That in truth and in fact, and unknown to the plaintiff or its officers, agents or employees, the SS Severn River had during 1966-1967, been stranded on rocks on the coast of a Middle-Eastern country, and as a result of such stranding, she became a total loss and was abandoned by her owners and withdrawn from navigation altogether.

Thirty-third: That, upon information and belief, the owners of the Severn River, International Navigation Corporation of Monrovia, Liberia, and its insurer, The London Steamship Owner's Mutual Insurance Association Ltd., knew full well of the withdrawal of the Severn River from navigation in 1966-1967 and yet neither they nor counsel for the insurers appearing in the suit pending in the Hamburg County Court, informed the court of such fact, but, instead they pressed their application, the limitation of judgment to an execution upon the Severn

River, which was no longer in existance, concealing the true information from the court.

Thirty-fourth: That the actions of the insurers and their attorneys as stated in paragraphs thirty through thirty-three, were intended to deceive the court and injure plaintiff thereby, by causing said limitations to be placed upon the judgment infavor of the plaintiff to defeat plaintiff's efforts at recovery for its loss.

Thirty-fifth: That in addition to the aforesaid deceitful action, the defendants, International Navigation Corporation of Monrovia, Liberia, and The London Steamship Owner's Mutual Insurance Co. Ltd., and the attorneys appointed by the insurer aforesaid perpetrated another fraud upon the courts of Hamburg, Germany, by their false claim that the extension of time to sue mentioned in paragraph Eighteenth hereof, was made and issued without any intention that plaintiff should rely upon said consent to start its suit on or before May 15, 1961, as it did on May 13, 1961, two days before the said time as extended to May 15, 1961, was to expire; which false fact was advanced to the court of first instance, the Hamburg County Court, but it was rejected by that court, and then such false fact was again advanced upon appeal, and it was adopted by that Court in its decision of

January 9, 1975, whereby that court was caused to dismiss the action against International Navigation Corporation of Monrovia, Liberia, applying Section 901 and 902 of the German Commercial Code which allegedly prohibits enforcement of extension of suit time where the creditor could not rely upon such extensions.

Thirty-sixth: That said actions of said defendants and the insurers' attorney in pressing such claims to facts known by them to be false, was a fraud upon the German court which rendered decisions thereon and they were also a fraud upon the plaintiff.

Thirty-seventh: That as a consequence of the frauds hereinabove specified, the judgments of the two German courts are null and void and of no force and effect except as admissions against the defendants' interests.

Thirty-eighth: That on or about the 16th day of April, 1972, plaintiff commenced an action in the United States District Court for the Eastern District of Virginia, Norfolk Division, against the defendant International Navigation Corporation of Monrovia, Liberia, to recover upon the judgment of the Hamburg County Court in its favor against that defendant because, deapite the pendency of an appeal therefrom by said defendant, no bond or other security to stay execution was filed because the Severn

River was not in existance.

Thirty-ninth: That within said suit in Virginia the attorneys appointed by the insurer, The London Steamship Owner's Mutual Insurance Association Ltd., through its United States representative, La Morte Burns Co. Inc., entered their appearance for the defendant in said action, but for the benefit and protection of said insurer, and they did there and then move to dismiss the suit on the alleged ground of improper service of process which fact was not true because process was issued by an attachment of the SS Virtus, a vessel owned by said International Navigation Corporation of Monrovia, Liberia, but nevertheless, said attorneys continued to press said dismissal with arguments that the judgment of the German court was in rem judgment against the vessel Severn River with no extension of liability to her owners, generally, despite the fact that the vessel was not within the custody of the courts in Germany, and despite the conceded fact that the SS Severn River had never been within the jurisdiction of the Hamburg courts, but nevertheless the district court in Virginia was induced by said attorneys for the insurers, to adopt that idea of an in rem judgment as a result of which the district court dismissed the suit and the

security for the judgment which would have been obtained therein by the plaintiff, had no such false claim been presented.

Fourtieth: That said claim of the attorneys for the insurer aforesaid was false and was known to them and their principal, to be false, but it was nevertheless advanced to the District Court at Norfolk, Virginia, purposely and fraudulently to deceive it in deciding as it did to dismiss that suit with the consequent damage and injury to the plaintiff, for the benefit of said insurer.

Forty-first: That in addition to the false claim to an in rem judgment, said attorneys for said Insurer, the London Steamship Owner's Insurance Association Ltd., stated to the district court as an additional reason for the dismissal of the action there pending that even if the complaint were to be considered as stating a cause of action on the original cause of action for cargo damage, that such a claim was then time-barred by operation of the time-bar provision of the Carriage of Goods by Seas Act of 1936 as amended, which was not true for such provisions were prevented from becoming operative by the commencement of the suits timely started as stated in paragraphs nineteenth through

through twenty-first of this complaint, which true facts though placed before the district court were ignored and the court did hold as an added reason for dismissal of said suit that it was barred by Cogsa as claimed by counsel for the insurer.

Forty-second: That upon appeal to the Court of Appeals, Fourth Circuit, that court affirmed on the grounds that the German judgment allegedly was an in rem judgment and that the original cause of action for cargo damage was time-barred by Cogsa.

Forty-third: That preceding said affirmation of the Fourth Circuit Court of Appeals, the decisions and judgment of the German Appeal Court was published holding among other concepts that the judgment against the defendant, the International Navigation Corporation of Monrovia, Liberia, was to be reversed and the plaintiff's suit was to be dismissed by operation of Section 901 and 902 of the German Commercial Code, which held the extension of time to sue granted in January 1961, was ineffective to extend suit time to May 15, 1961, because said extension was granted without an intention that it would be relied on.

Forty-fourth: That reargument was sought of the Court of Appeals, Fourth Circuit, to

reverse its holding of dismissal because that part holding that German judgment was in rem judgment having been reversed and dismised, it made the question of whether it was an in rem judgment or not moot and the Circuit Court was urged to remand to permit the complaint to proceed on the original cause of action for cargo damage, because the earlier filings of the complaints in this case before the expiration of the time to sue expired, effectively prevented the vesting of any claim to Cogsa's time-bar.

Forty-fifth: That the Court of Appeals reconsidered its decision, withdrew its holding of a time-bar but continued the dismissal because the judgment was an in rem judgment.

Forty-sixth: That the foregoing dismissal was caused by the claims of the attorneys for the insurer of the shipowner claiming an in rem judgment which was patently false, and known to them to be false, and were advanced for the purpose of having the court rely upon their claims as though they were true and consequently they deceived the courts to the hurt and detriment of the plaintiff.

Forty-seventh: That plaintiff was seriously prejudiced by said dismissal, as a result of which it lost its security, it lost its right

to a trial on the merits of its claim against the defendant, The International Navigation Corporation of Monrovia, Lieria, and it was made to incur large expense of litigation which was rendered futile by said deceitful action of the attorneys for said insurer acting for the benefit and interest of said insurer.

Forty-eighth: That within the suit filed on May 12, 1961, in the United States District Court for the District of New Jersey, plaintiff moved that court in February 1976, to restore the case to the docket for trial, and the defendant International Navigation Corporation of Monrovia, Liberia, appeared in opposition to that motion by attorneys, again, appointed by the insurer The London Steamship Owner's Insurance Association Ltd., through its United States representative, La Morte, Burns Co. Inc., of New York, New York and who proceeded to claim the operation of the time-bar as provided by Cogsa which if the facts of the timely commencement of the earlier suits were made known, would defeat the operation of Cogsa's time-bar as decided by the Court of Appeals, Fourth Circuit; that the decision of the said Fourth Circuit was to be given full faith and credit; yet said false claim to a time-bar was made and advanced to the court, knowingly, to induce the court to accept such a reason for denying the plaintiff's

motion, and plaintiff's motion was denied as time-barred by the provisions of Cogsa despite the commencement of the suits within the period of time as required by Cogsa as stated in paragraph Nineteenth through Twenty-first of this complaint and as found by the Fourth Circuit Court.

Forty-ninth: Furthermore, that said attorneys appearing in the District Court of New Jersey although appearing at first to be representing International Navigation Corporation of Monrovia, Liberia, did covertly and intentionally state to the District Court that the judgment for $33,000. in the German court would require a denial of the motion, which if done, would effectively dismiss that action as against the charterers as well as against the shipowner and the District Court did deny the motion although on the face of it, there was no appearance for the charterers and no opposition to the restoration of the case as against the charterers filed by them with the court, and the insidiousness of the argument was furthered by counsel for the insurer of the shipowner, when he submitted an order to be signed by the court in which he had stated that the dismissal was against the charterer as well as the shipowner, with prejudice.

Fiftieth: That plaintiff took exception to a dismissal with prejudice and called the attention of the court to the fact that the defendants, both charterers and shipowner, had effectively appeared generally and took part in the proceedings then before the court in arguing for a denial of the motion to restore the case to the docket to favor the charterers as well as the shipowner, but counsel for the insurers protested saying he had not appeared to argue for charterers as well as the shipowner and offered to withdraw his proffered order, and the court did not sign the proposed order but allowed his decision to stand.

Fifty-first: That said decision of the district court was appealed to the Court of Appeals, third Circuit, but again said attorneys for the inusrers aforesaid advanced the false fact of a time-bar under Cogsa and his disavowal of having argued and taken part in the proceeding for the charterers as well as the shipowner, and the Court of Appeals was induced to affirm the decision of the district court.

Fifty-second: That such deceitful action perpetrated a fraud upon the courts aforesaid, actually causing harm and injury to the plaintiff, and causing the loss of plaintiff's right to a trial of its said cause on the merits.

Fifty-third: That all of the foregoing

acts of the attorneys employed by the insurers were intentionally and wilfully made to deceive the courts for the benefit and interest of the insurers to the hurt and detriment of the plaintiff.

Fifty-fourth: That by reason of the premises aforesaid, the defendants, Newcastle Protection & Indemnity Association, and The London Steamship Owner's Insurance Association Ltd., are liable to plaintiff because plaintiff has sustained damage in being denied a trial of its cause for cargo damage on the merits, except as it has been restated in this complaint, and it has necessarily incurred and expended large sums of money to protect its rights to recover for its cargo damage claims as was proven to be valid by the recovery allowed by the Hamburg County Court, by reason of the aforesaid intervention of said insurers in the fraudulent manner aforestated, in the full sum of $200,000. no part of which has been paid although duly demanded.

Fifty-fifth: That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Fifty-sixth: That the sum in controversy exceeds $10,000. and this suit involves citizens

of different states and citizens of a foreign state who are either citizens or subjects of that foreign state, as in Section 1332 of Title 28 U.S.C. mentioned.

WHEREFORE plaintiff prays that 1) the summonses in due form of law issue against the defendants and each of them be cited to appear and answer on oath all and singular the matters aforesaid, and, 2) that this honorable court will order, adjudge and decree that said defendants or either of them to pay to plaintiff the damages suffered by it as hereinabove mentioned with interest thereon and the costs and disbursements of this action, and that plaintiff whall have such other and further relief in the premises as in law and justice it may be entitled to have.

Yours etc.,

ANTHONY B. CATALDO
Attorney for Plaintiff
111 Broadway
New York, New York 10006

SAME CAPTION OPINION ON MOTION TO DISMISS

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By: Robert W. Mullen, Esq.
Of Counsel

Sweet, D.J.

Plaintiff M. W. ZackMetal Co. ("Zack") brought this action in July, 1978, principally under the court's admiralty jurisdiction, based on a cargo damage claim which just marked its twenty-first anniversary. The claim - or at least a portion of it - passes that milestone, as all of the issues in the current chapter of this litigation could not be resolved on defendants' motion to dismiss. However, that motion will be granted with respect to the first, second, third and fifth causes of action, which will be dismissed.

On February 16, 1960 the S.S. Severn River (the "Severn River"), owned by defendant International Navigation Corporation of Monrovia ("International"), a Liberian corporation, and under charter to defendant Jansen & Co.,Contam Linie ("Contam Linie"), a German partnership,[1] discharged in New York[2] 93 coils of hot-rolled steel ("the steel") belonging to Zack. The steel had been loaded at Antwerp, Belgium on a clean bill of lading signed ;by the vessel's master, but upon arrival was found to be damaged. Zack calculated a loss of approximately $80,000, the market value of the steel being $110,000 and the net salvage value $30,000. After unsuccessful efforts at settling the dispute, a mass of litigation in this and other courts followed,

the outlines of which must be recounted here in order that the instant complaint, alleging five causes of action, be fully understood.

On or about February 11, 1961 Zack commenced a suit on the cargo claim in this court against the Severn River, Contam Linie and Jansen. That action apparently was dismissed without prejudice for failure to prosecute, service not having been effected on any of the defendants. On or about May 12, 1961 a similar action was commenced in the United States District Court for the District of New Jersey; it was subsequently dismissed, apparently for the same reason. On or about May 13, 1961 an action was commenced by Zack in the County Court for Commercial Affairs in Hamburg, Germany, naming as defendants International, Contam Linie, Jansen and Krafft. The German action was litigated at the trial level for ten years. With the third and final decision of that court on December 7, 1971, Contam Linie, the partners and International had been found liable to Zack in the amount of approximately $64,000 plus interest from February 1960 and part of Zack's costs. International's liability was limited to execution upon the Severn River, Zack's claim against that defendant being otherwise dismissed.[3] Both sides appealed from that determination.

In the meantime, in November, 1961 Zack had brought an action against its cargo underwriter, Federal Insurance Company ("Federal"), on the damage claim in New York State Supreme Court. That litigation also spanned the decade. After two trials and appeals,[4] and part way into a third trial, a settlement was reached on March 14, 1968 whereby Zack apparently received $40,171 plus interest. Additionally, the parties agreed that Zack would continue to prosecute its action in Germany and pay to Federal 55% of any net recovery. The London Steamship Owner's Mutual Insurance Association, Ltd. ("London"), and Newcastle Protection & Indemnity Association ("Newcastle"), the insurers of International and Contam Linie respectively, and defendants in the instant action (collectively "the insurers"), subsequently purchased from Federal its interest in the outcome of the German litigation.[5]

In November, 1971, after the German trial court had already declared the liability of Contam Linie and the partners, to forestall execution on the judgment Newcastle, which along with London had apparently been involved in the defense of that action, signed a guarantee of satisfaction of payment of the award to Zack, conditioned on a final decision of the German

courts or a settlement agreement.

With appellate proceedings underwayin Hamburg, in 1972 Zack filed suit on the same claim in the United States District Court for the Eastern District of Virginia, causing to be attached for purposes of that suit a different vessel owned by International which had put into Norfolk. The vessel was released after International posted security, and the suit ultimately was dismissed. In affirming, the Court of Appeals for the Fourth Circuit held:

> It may be that the (German) appellate court will impose some other liability upon (International), but it is plain that the (German) trial court limited (International's) liability to its interest in the Severn River. Essentially and substantively, it is an in rem judgment against the Severn River, imposing no in personam liability against its owner, and furnishing no basis for the assertion of an in personam liability on the owner or the attachment of any other vessel owned by International. The attachment, of course, may not be based upon the speculative possibility that the reviewing court in Germany may give Zack greater rights against (International) than the trial court did.

M.W. Zack Metal v. International Navigation Corp., 510 F.2d 451, 452-53 (4th Cir.), cert. denied, 423 U.S. 835 (1975).

Actually, it seems that on January 9, 1975 the Hanseatic Provincial Court of Appeals in

Germany had rendered its opinion. That court dismissed altogether Zack's claim against International, on the basis of the one year time bar on cargo damage claims under the Carriage of Goods by Sea Act ("COGSA") 46 U.S.C. §§ 1303(6) and applicable German law, ruling that a written extension of the deadline to sue from February 16 to May 15, 1961, given Zack from Oceania of Canada, Ltd., Contam Linie's agent in New York, did not bind International as well (the German suit having been filed on May 13, 1961); further, the court reduced the damages against Contam Linie and the partners, the remaining defendants, to $33,000 plus interest and part of Zack's costs. The court considered the matter of Federal's right to the 55% set-off which had been assigned to the insurers, but apparently decided that any claims based thereon should be asserted only after the decision on the primary claim was rendered. Thereafter, Newcastle apparently posted a bond to guarantee satisfaction of payment of the charterers' liability, and filed what is characterized as a lien to protect its 55% interest in Zack's recovery. The present, however, Zack has not executed on what is here loosely termed the "judgment" of the German appeals court,[6] and no money has changed hands among

the interested parties in Germany, the parties having been unable to agree on the proper amounts for the various payments - taking into consideration attorneys' fees and costs - under the terms of the decision of the appeals court and of the Zack-Federal settlement (and the later assignment to the insurers).

In 1976, Zack moved in the United States District Court in New Jersey to have the libel against the Severn River - which it had brought (and had been dismissed) on the cargo claim several years before in that court - restored to the docket as an in personam action against International and perhaps other defendants. That motion was denied, and the decision of the district court affirmed on appeal.

Finally[7] (at least for the time being), the instant action was filed on June 30, 1978. The named defendants are Contam Linie and the partners (collectively "the charterers"), International, and the insurers. The insurers and Krafft have effectively been served, and appeared. Service on International has been attempted through an agent in Baltimore and a freight forwarder in Monaco; International has appeared specially, reserving the defense of lack of in personam jurisdiction.

Zack's complaint alleges five causes of

action: (1) against International and the charterers for breach of the terms of the bill of lading; (2) against the charterers and Newcastle to pay the cargo damages; (3) against International and London to pay the cargo damages; (4) against the charterers and Newcastle to honor the guarantee of satisfaction of the German judgment entered into by Newcaastle; (5) against the insurers for alleged fraud perpetrated on the various courts which have rendered decisions during the protracted multi-faceted litigation of Zack's claim.

In support of the motion to dismiss the various causes of action, defendants urge the court to apply applicable statutes of limitations and the principles of laches and res judicata; International presses as well this court's lack of personal jurisdiction over it.[8] Zack in turn moves for summary judgment. For the reasons stated below, all claims of Zack against all defendants are dismissed, with the exception of the fourth cause of action against Newcastle on its guarantee of satisfaction of the German judgment.

The instant action was filed more than eighteen years after the Severn River delivered the damaged steel. COGSA, 46 U.S.C 1303(6), which undisputedly applies to the cargo claim,

provides in pertinent part: "In any event the carrier and the ship shall be disharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods..." See United States v. The South Star, 210 F.2d 44 (2d Cir. 1954); Monarch Industrial Corp. v. American Motori s Ins. Co., 276 F. Supp. 972, 979 (S.D.N.Y. 1967). Zack urges that the terms of the COGSA time bar have been satisfied by its previous filing of a libel on the same cargo damage claim in this court on February 11, 1961 (an action which subsequently was dismissed), and by its dogged litigation of the claim in various courts since then. Zack's argument seems to be that once tolled in 1961, this COGSA provision could never again be a bar to a suit arising out of the original cargo damage claim. The court finds Zack's position wanting both in reason and in support from the case law.

Ore Steamship Corp. v. D/S A/S Hassel, 137 F.2d 326 (2d Cir. 1943)and United States Relief and Rehabilitation Adm. v. The Mormacmail, 99 F. Supp. 552 (S.D.N.Y.1951), cited by Zack, correctly stand only for the proposition that a suit in admiralty is instituted by the filing of a libel, which tolls the COGSA time bar; such a suit will not be dismissed merely be-

because service of process is not effected until after the expiration of the one year period, unless laches, involving undue delay in prosecution and resultant prejudice to the defendant, is shown. See also Howmet Corp. v. Tokyo Shipping Co., 318 F. Supp. 658 (D. Del. 1970); 2A Benedict on Admiralty § 163 at 16-8 (6th ed. 1977). Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955) held that where a libel has been timely filed in one federal district court on a cargo damage claim in the anticipation that a vessel will be found there and it is later discovered that the vessel is in another district where the libel could have been filed, the action may properly be transferred even after the running of the statutory period; the rights of the libellant having been preserved against the running of the statute by the institution of the suit, absent laches the interest of justice would be served by the transfer, given that a new proceeding would be time barred. Id. at 516-17. Compare Hugo Stinnis Steel & Metals Co.v. S.S. Elbe Oldendorff ("StinnisII"), 372 F. Supp. 705 (S.D.Ga. 1974) (Where Judge Metzner of this court denied such a motion to transfer what he termed a "stale claim," 363 F. Supp. 1391 (S.D.N.Y.1973), aff'd. mem. 505 F.2d 727 (2d Cir.1974) ("Stin-

nis I"), the court in Georgia held that the pendency of the unserved action in New York did not toll the COGSA limitation period with respect to a distinct untimely suit on the same claim.)

Neither these authorities nor any others the court has discovered support Zack's claim that its rights were preserved through eighteen years by the timely filing of a libelin 1961 and its activities in various courts thereafter. The original action was long ago dismissed for failure to prosecute; had it not been dismissed when it was, it would certainly have been vulnerable to the laches defense by now. Thus, the refusal of the district court in New Jersey to restore the action previously filed there to its calendar five years ago is readily understandable. As well, there are present here no elements which would allow Zack to revive and then amend its original libel filed in the Southern District. Cf. Monarch Industrial Corp. v. American Motorists Ins. Co., supra, at 980-81; compare Unilever (Raw Materials) Ltd. v. M/T Stolt Boel, 77 F.R.D. 384 (S.D.N.Y. 1977).

Even if there were a pending suit elsewhere on the cargo damage claim which for some reason had not been dismissed, the grant of a

transfer to this court at this time could hardly be expected. See Stinnis I, supra. Furthermore, the pendency of such a suit (including, arguably, the German action, in which there has yet to be an execution upon the final decision) would be no basis on which to toll the COGAS time bar to allow a distinct action on the same claim. Internatio-Rotterdam, Inc. v. Thomsen, supra; Stinnis II, supra; see also Froelich v. Petrelli, 472 F. Supp. 756, 760 n.7 (D.Ha. 1979).

The COGAS one-year provision may be waived by an agreed extension of time for a fixed and reasonable period, but then the waiver is effective for that period only. Monarch Industrial Corp. v. American Motorists Ins. Co., supra, at 979; see also International Har e ter Export Co. v. Skibsaktieselskab Hilda Knudsen, 106 F.Supp.880 (S.D.N.Y.1952). There was a written extension of time given to Zack which was found to be binding on Contam Linie and the partners, but not on International, to preserve Zack's right to bring the German action; whether or not the German court was correct in finding that only the charterers were bound by the waiver, by its terms that extension ran from January 15 to May 15, 1961 and no longer. Finally, there has been no demonstration that

defendants, by their representations, promises or conduct, should be estopped from asserting the time bar after all these years. See Bitchoupan rug Corp. v. A/S Atlas, 1975 A.M.C. 298 (S.D.N.Y. 1975); Austin, Nichols & Co. v. Cunard Steamship, Ltd., 367 F. Supp. 947, 949 (S.D.N.Y. 1973); cf. Rayon y Celanese Peruana v. M/V PHGH, 471 F. Supp. 1363, 1371-72 (S.D.Ala. 1979). The first cause of action may not be maintained.

By the second and third causes of action, Zack seeks to collect from the insurers any damages awarded herein against the charterers and International. The insurers have submitted an affidavit of counsel and attached exhibits (the Rules of Newcastle and London then governing, and the relevant sections of the insurance policies) in support of their argument that they are mutual insurance companies with no direct obligation to Zack, but only liable to indemnify their members for payments made under covered risks. Judging by the language contained in the documents before the court[9] (Zack having offered no contrary evidence), the policies of insurance of the charterers and International in effect at the time Zack's claim arose were indeed indemnity policies, and no liability of the insurers arises until payment is made by the insured to the injured third party on a claim. Ahmed v. American S.S. Owners

Mutual Protection & Indemnity Assoc., Inc., 444 F. Supp. 569, 571 (N.D. Cal. 1978) (applying New York law); Liman v. American S.S. Owners Mutual Protection & Indemnity Assoc., Inc., 299 F. Supp. 106, 109 (S.D.N.Y.), aff'd, 417 F.2d 627 (2d Cir. 1969)(per curiam), cert. denied, 397 U.S. 936 (1970). Therefore, with the first cause of action dismissed, these next two causes against the indemnity insurers must also fail.

The remaining two causes of action are independent from the original cargo damage claim, and so are not necessarily barred. Zack seeks $200,000 damages for alleged fraud committed by the insurers and others associated with these defendants in prior chapters of this litigation in the German courts, in the federal district courts in Virginia and New Jersey, and in the appeals of those trial court decisions.

Specifically, Zack alleges the following acts done intentionally and wilfully "to deceive the courts for the benefit and interest of the insurers to the hurt and detriment of the plaintiff": (1) withholding from the German trial court in 1971 of the fact that the Severn River actually had foundered on rocks and had become a total loss some years before, thus deceiving that court into limiting

execution of judgment as against International, pursuant to German law, to the ship; (2) misrepresentation before the German courts, at trial and on appeal, concerning the written extension of time to sue given to Zack in 1961, leading the appellate court to hold that suit against International was time-barred; (3) misrepresentation before the United States District Court for the Eastern District of Virginia in 1972, and later before the Court of Appeals for the Fourth Circuit, concerning the nature of the limitation placed by the German trial court on execution of judgment against International, causing those two courts to construe that German judgment as in rem and reject Zack's attempt to execute through attachment of another vessel of International in Norfolk; (4) falsely stating to the federal courts in Virginia that the claim against International was time-barred under COGSA; and (6) deceitfully attempting to convince the federal district court in New Jersey to dismiss the action with prejudice against all defendants on the basis that the decision of the German appellate court was res judicata.[10] In addition, by affidavit, letter and in oral argument Zack has accused defendants of perpetrating frauds of a similar nature upon this court.

To defeat suggestions that the seemingly relevant state six-year statute of limitations, New York C.P.L.R. § 213(9)(McKinney 1972), would defeat several of the individual fraud claims, Zack goes to some lengths in its submission in response to the motion to dismiss, to characterize the complained-of activities as component parts of an ongoing twenty-year conspiracy of fraud orchestrated by the insurers - who were not even parties to the prior suits but who allegedly managed the defense ;thereof - to frustrate Zack's attempts to recover the damages to which it is entitled. This argument is beside the point.

Although the fraud cause of action is styled as one for damages against the insurers, it is in reality a collateral attack on the decisions and judgments rendered in the prior actions in Germany and in the United States; the gravamen of the claim necessarily is that the various courts would have rendered decisions favorable, or more favorable, toZack had it not been for the alleged wrongdoing of these defendants and others associated with them. Griffith v. Bank of New York, 147 F. 2d 899, 901 (2d Cir.), cert. denied, 325 U.S. 874 (1945); Cataldo v. Land, 78-2 U.S.T.C. para. 9535 (E.D. N.Y. 1977), aff'd, 78-2 U.S.T.C. para. 9622

(2d Cir. 1978). The cause properly is analyzed under Fe.R.Civ.P. 60(b).[11] See generally Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 86 F.R.D. 131, 135-140 (E.D. Va. 1980). Leaving aside the issues of whether the fraud alleged is properly chargeable to any of the defendants, or whether the allegations are sufficiently particular, this cause of action fails.

Zack terms its claim as one for "fraud upon the court." It is alleged that attorneys for International and for the charterers, who actually were retained by the insurers, consistently misrepresented the applicable law and operative facts in prior proceedings. The claim thus arguably satisfies the requirement that it be of "that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial taks of adjudging cases that are presented for adjudication," 7 Moore's Federal Practice, para. 60.33 at 515 (1979 ed.)(footnote omitted), quoted in Serzysko v. Chase Manhattan Bank, 461 F.2d 699(2d Cir.), cert. denied, 409 U.S. 883 (1972); see Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238

(1944); Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 836-37 (2d Cir. 1980); H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118-19 (6th Cir. 1976); Konigsberg v. Security National Bank, 66 F.R.D. 439, 442 (S.D.N.Y. 1975). As such, Zack is correct in asserting that no part of its fraud claim would be time-barred. Hazel-Atlas Co. v. Hartford-Empire Co., supra, at 246; 7 Moore's, supra, at 509. However, Zack's claim of fraud upon the court(s) may not be litigated here, but must be pressed in the various courts which were allegedly defrauded. Hazel-Atlas Co. v. Hartford-Empire Co., supra, at 246-48; Pfotzer v. Amercoat Corp., 548 F.2d 51, 52-53 (2d Cir. 1977); Notes of the Advisory Committee on Fed.R.Civ.P. 60(b); 7 Moore's, supra, at 505-06.

Alternatively, insofar as Zack has attempted to institute an independent action to set aside the results of the prior proceedings (and to the extent that such a cause would not be barred bylaches, see Moore's supra, at 505), that claim must also fail as a matter of law. Such an independent action has traditionally been sustainable only in cases of extrinsic, as opposed to intrinsic, fraud, United State v. Throckmorton

98 U.S. 61, 68 (1878); in any event, it will not lie where there was an opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action. See Serzysko v. Chase Manhattan Bank, supra, at 702 & n.2; Konigsberg v.Security National Bank, supra, at 442-43. Each instance of fraud alleged here was intrinsic to a prior judicial proceeding; moreover, in each instance the alleged wrongful conduct of defendants in presenting "false" facts and legal arguments to the courts in prior proceedings was raised and considered in the proceeding in question or on appeal therefrom.[12] Such allegations do not form a proper basis for this collateral attack. See Cataldo v. Land, 78-2 U.S.T.C. para. 9535, supra. Zack is not saved in this respect by its bald characterization of defendants' fraudulent conduct as a conspiracy. See Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 421-24 (1923); Moffett v.Robbins, 81 F.2d 431, 436 (10th Cir.) cert. denied, 298 U.S. 675 (1936); 7 Moore's supra, para. 60.37 (1) at 617 n.34; compare Burbrooke Mfg. Co. v. St. George Textile Corp., 283 A.D. 640, 129 N.Y.S.2d 588 (1st Dept. 1954).

Finally, Fed.R.Civ.P. 60(b)(3), which provides for the granting of relief from a final judgment for "fraud (whether heretofore de-

nominated intrinsic or extrinsic), misrepresentation, or other misconduct or an adverse party" cannot be the basis of Zack's claim for a number of reasons, the most obvious of which is that that subsection of the Rule applies only to judgments obtained in the same district court to which application for relief from the fraud is made. See United States ex rel. Aigner v. Shaughnessy, 175 F.2d 211 (2d Cir. 1949); 7 Moore's, supra, para. 60.28(1) at 387.[13]

The fourth cause of action, asserting Newcastle's failure to honor its guarantee of satisfaction of the final German decision granting Zack $33,000 plus interest and part of costs, remains. Newcastle offers no basis for the court to dismiss this claim of Zack, but argues first that the guarantee has not become due because the decision of the German appellate court has not been reduced to judgment, and second, that even if it has, Newcastle holds a validlien on part of the award due Zack. Questions of fact and law are thus presented hich cannot be resolved at this stage. On this cause of action against Newcastle, and this alone, the case will be placed on the non-jury ready trial calendar on March 16, 1981.[14] Zack and Newcastle will submit a revised pre-

trial order and briefs before that date. The remainder of the complaint is hereby dismissed.

IT IS SO ORDERED.

DATED: New York, N.Y.
February 18, 1981

Robert W. Sweet
U.S.D.J.

FOOTNOTES

1. Contam Linie apparently is no longer in existence. Defendants Hans H. Jansen ("Jansen") and Jurgen K. Krafft ("Krafft") (collectively "the partners") were the partners in Contam Linie.

2. The steel apparently was delivered by the Severn River to a point in New Jersey, after which it was transferred by separate means to Zack's custody at a pier in New York. International presses this point in arguing that this court has no personal jurisdiction over it. However, given the court's disposition of the action, the matter need not be further addressed.

3. This was the finding of the United States District Court for the Eastern District of Virginia (as reflected in the decision on appeal) which had before it the same "agreed translation" of the German decision in question (dated December 7, 1971) as does this court. See M.W. Zack Co. v. International Navigation Corp., 510 F.2d 451 (4th Cir.), cert. denied, 423 U.S. 835 (1975). Zack here disputes the characterization of that judgment as in rem; in view of the superseding determination of the German appellate court, see infra, and this court's disposition of the instant action, this matter need not be further addressed.

4. The two opinions on appeal, in the action captioned M.W. Zack Metal Co. v. Federal Insurance Co., are reported at 26 A.D.2d 54, 271 N.Y.S.2d 1 (1st Dep't. 1966) and 28 A.D.

2d 1109, 284, N.Y.S.2d 582 (1st Dep't. 1967).

5. In February , 1970 Zack apparently commenced an action against the insurers for fraud in purchasing this interest of Federal. Zack represents that that action is still pending. By affidavit of counsel dated January 12, 1981, Zack seeks to amend the fifth cause of action of its complaint herein to include the alleged fraud which is the subject of the state action. Zack may not so effect an amendment of its complaint. In any event, such an allegation of fraud would be time-barred. New York C.P.L.R.§ 213(9)(McKinney 1972).

6. Whether the decision of the German appellate court of January 9, 1975 in fact constitutes a judgment which Newcastle must satisfy pursuant to the guarantee it signed, is at issue with respect to Zack's fourth cause of action herein. See infra.

7. It has been extremely difficult to reconstruct the history of this litigation, perhaps for the very reason that in its course the parties have submitted volumninous motions, memoranda, affidavits and correspondence, not all of which have been succinct and germane.

8. This court has not accepted Zack's attempts to serve International, nor has Zack presented the court with authority for the proposition that International's contacts with New York provide the basis for the court's asserting personal jurisdiction over it. As the court's disposition of the case dismisses International as a defendant on other grounds, the jurisdictional matter need not be further addressed.

9. Rule 4 of the Newcastle Protection and Indemnity Association for 1959 reads, in pertinent part:

> Subject to the provisions of these Rules, a Member shall be protected and indemnified against all or any of the following claims and expenses which he shall become liable to pay and shall in fact have paid in respect of a ship entered in the Association....

Rule 6 of The London Steam-Ship Owners' Mutual Insurance Association, Ltd. for 1959-60 reads, in pertinent part:

> Provided always that in the case of a liability actual payment (which shall be made out of moneys belonging to him absolutely and not by way of loan or otherwise) by the Member of the full amount of such liability shall, unless the Committee otherwise decide, be a condition precedent to the right of the Member to recover and the obligation of the Association to satisfy and make good.

Nothing before the court indicates that either of the policies contained any special provision to the contrary.

10. See also note 5.

11. Fed.R.Civ.P. 60(b) provides, in pertinent part:

> On motionand upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

...

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party....

...

The motion shall be made within a reasonable time, and .. notmore than one year after the judgment, order, or proceeding was entered into or taken.

...

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding ... or to set aside a judgment for fraud upon the court.

12. Consideration of the one possible exception in this respect, the alleged withholding from the German trial court of the plight of the Severn River, was rendered moot in any event by the subsequent decision on appeal, which dismissed outright the case against International on a different ground.

13. Zack does not argue that any of the fraudulent conduct alleged should be attributed to any of its adversaries in the prior proceedings - that is, to the defendants other than the insurers. See 7 Moore's, supra, para. 60.24(5) at 290-91. This cause of action names only the insurers, who are alleged to have engaged in fraudulent behavior through attorneys retained to defend in the previous suits against International and the charterers.

If this claim of Zack's be taken strictly on its own terms, with the insurers committing frauds as independent third parties to prior proceedings, the Rule 60(b) analysis

shifts only in that fraud which when committed by an adverse party in the prior proceeding is pigeonholed under Rule 60(b)(3) must be considered instead under Rule 60(b)(6). See e.g., McKinney v. Boyle, 404 F.2d 632, 634 (9th Cir. 1968), cert. denied, 394 U.S. 992 (1969); 7 Moore's supra, para. 60.24(5) at 291. Zack is precluded from utilizing subsection (6), just as it is precluded from utilizing subsection (3), because the fraud challenge has not been brought in the district court in which the fraud was allegedly committed (and additionally, where relevant, because of the one-year-from-date-of-judgment time bar applicable explicitly to Rule 60(b)(3), and implicitly to Rule 60(b)(6). Serzysko v. Chase Manhattan Bank, supra, at 701-02.) Otherwise, with respect to fraud upon the court as well as the independent action in equity, the analysis is unchanged. See id. at 291-92. Moreover, this analysis leads inexorably to the same conclusion--i.e., that the fifth cause of action must be dismissed--even if the complaint should be read liberally to allege fraud against the other defendants as well.

14. There has been a dispute as to whether Zack is entitled to and/or has demanded a trial by jury on some or all of the causes of action. Fed.R.Civ.P. 38. Whether or not Zack made such a timely demand with respect to some of the causes and defendants, there has been no showing that any demand was ever made on Newcastle, the only defendant before the court on the fourth (and sole remaining) cause of action - or indeed that any demand was made in connection with or at about the time of the filing of the original complaint. Therefore, even if Zack would have been entitled to a jury trial against Newcastle on this cause, it has waived that right.

SAME CAPTION

Decision of J. Sweet at conclusion of Plaintiff's case dismissing fourth cause of action.

With respect to the motion to dismiss the plaintiff's case for failure to make out a prima facie case, that motion is granted.

This case has throughout been an extremely difficult one and the effort maintains to try to do substantial justice.

The exhibits presented to me indicate that in 1971, November 29, the defendants entered a guarantee or signed a guarantee and the language of the guarantee is to pay upon first request the agreed sum plus interests and costs in the amount to which the plaintiff is entitled pursuant to a final decision of the German courts or on the basis of a settlement.

The guarantee also refers to the judgment of the German trial court which required the defendants -- which determined that the defendants were entitled to $64,017.63 -- plaintiffs were entitled to recover $64,018.03 plus interest since February 10, 1960.

Also introduced in evidence, though I must confess that the evidentiary submission was not in accordance with Rule 41, if that is the right rule, nonetheless the -- I am sorry, Rule 44 -- was not in accordance with Rule 44, but

nonetheless the ;judgment has been admitted, that is, the ;judgment of June 15, 1971 in the German court.

Further, there has been admitted what purports to be and apparently is a determination by the Hanseatic Provincial Court. That is Plaintiff's Exhibit 3.

It is evident from that document that an appeal was taken and I think the proof here establishes that an appeal was teken from the trial court determination, and the appellate court, as has been indicated by both counsel, reduced the judgment to an amount in the neighborhood of $33,000.

From these documents it is apparent that something is owed to the plaintiff by the defendants and of that there can be no question.

However, this is a court of law. The guarantee speaks in terms of a final judgment, final dceision and there has been no evidence submitted to this Court as to what the amount of that final judgment is.

It may well be that the determination of the Hanseatic Provincial Court is in fact a final judgment, but no evidence has been submitted and no briefs have been submitted, no German law has been submitted to substantiate that proposition.

Indeed there has been testimony here that

the matter of costs and fees has not been finally determined in the German courts.

For these reasons, therefore, I find it necessary, despite the clear implication of these documents, that is, that money is owed by the defendants to the plaintiff, despite that, I am unable to -- despite that I am compelled to grant the motion to dismiss for failure to establish the amount, the entry of o. the amount of a final judgment in the German courts.

It should go without saying under these circumstances that this dismissal is without prejudice.

Now, do you press your counterclaim, Mr. Allen?

MR. ALLEN: Yes, your Honor, I do.

THE COURT: Tell me what you want to do.

MR. CATALDO: Your Honor said you were going to go ahead only on the fourth cause of action. I am not prepared to try --

THE COURT: No, we are going forward.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 473, 580 August Term, 1981

(Argued January 25, 1982 Decided April 12, 1982)

Docket Nos. 80-7003, 81-7353

M. W. ZACK METAL CO.,

Plaintiff-Appellant-Cross-Appellee,

v.

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & CO., CONTAM LINEIE, HANS H. JANSEN, JURGEN K. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION, LTD.,

Defendants-Appellees.

NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S INSURANCE ASSOCIATION LIMITED,

Defendants-Appellees-Cross-Appellants.

B e f o r e : MESKILL and CARDAMONE, Circuit Judges and HOLDEN, District Judge.*

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* Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

Appeal from a judgment entered by the United States District Court for the Southern District of New York, Robert W. Sweet, Judge, dismissing M. W. Zack Metal Co.'s complaint which sought recovery for cargo damage and for fraud, and cross-appeal by Newcastle Protection & Indemnity Association and the London Steamship Owner's Mutual Insurance Association Limited from dismissal of their counterclaim alleging malicious prosecution and abuse of process.

Affirmed. Judge Cardamone filed an opinion concurring in part and dissenting in part.

ANTHONY B. CATALDO, New York, New York
for Plaintiff-Appellant.

DONALD B. ALLEN, New York, New York
(Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, New York, New York, of counsel),
for Defendants-Appellees-Cross-Appellants.

Robert W. Mullen, Dickerson, Reilly & Mullen, New York, New York,
for Defendants-Appellees.

MESKILL, Circuit Judge:

M. W. Zack Metal Company ("Zack") appeals from a judgment entered by the United States District Court for the Southern District of New York, Robert W. Sweet, Judge, dismissing its complaint, which sought recovery for cargo damage and for fraud. Newcastle Protection & Indemnity Association and the London Steamship Owner's Mutual Insurance Association Limited (the "Insurers") cross-appeal from Judge Sweet's dismissal of their counterclaim for malicious prosecution and abuse of process. For the reasons set forth below, we affirm the district court's decision in all respects.

BACKGROUND

Zack comes before this Court with a matter that was first litigated over twenty-two years ago and that has consumed an inordinate amount of the resources of courts in this country and abroad. The facts and procedural history of the dispute are as follows:

On January 18, 1960, Zack purchased ninety-three coils of Austrian hot rolled steel which it had contracted to sell in the United States to Dearborn Steel Sales, Inc. The steel was

shipped under a clean bill of lading from Belgium to New York aboard the S.S. SEVERN RIVER, a vessel owned by International Navigation Corporation of Monrovia ("International"), a Liberian corporation, and under charter to Jansen & Co. (the "Charterer"), a German partnership. The steel was damaged in transit and, after Dearborn Steel refused to accept shipment, was sold by Zack to a German company for approximately one-half of Zack's cost.[1/]

On February 11, 1960, Zack commenced suit against the SEVERN RIVER and the Charterer in the United States District Court for the Southern District of New York seeking to recover $80,000 in damages, the difference between the market value of the steel in good condition and its salvage value less resale expenses. That action was dismissed without prejudice for failure to prosecute, service having never been effected on any of the defendants. Thereafter, on January 27, 1961, Zack sent a letter to the Charterer's agent in New York, Oceanica of Canada Ltd., requesting an extension until May 15, 1961 of the limitations period under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1303(6) (1976).[2/]

Oceanica granted Zack's request.

Three days before the extension was due to expire, Zack filed identical actions for the cargo loss in the United States District Court for the District of New Jersey and the United States District Court for the Eastern District of New York. The following day, Zack filed a similar action in the County Court for Commercial Affairs in Hamburg, Germany. Both district court cases were dismissed for failure to prosecute.

While the German case was pending, Zack brought an actin in New York State Supreme Court against its cargo underwriter, Federal Insurance Company ("Federal") to recover for the cargo loss. On March 14, 1968, after two trials and two appeals, and during a third trial, a settlement was reached under which Zack received $40,000 on the cargo damage claim plus $19,453 in interest.[3/] The settlement also permitted Zack to continue the action in Germany provided that Federal received fifty-five percent of any net recovery.

In 1970 the Insurers, indemnity insurers of the Charterer and International, purchased Federal's interest in the outcome of the German

litigation. Zack then commenced an action against the Insurer's charging them with fraud in purchasing Federal's interest. Zack represents that this action is still pending.

On December 7, 1971, after ten years of litigation, the German trial court found the Charterer, its partners and International liable to Zack for $64,000 plus interest and costs.[4/] International's liability was limited to execution upon the SEVERN RIVER, which, unknown to the German court, had foundered at sea some three years earlier.

Later in 1971, Newcastle, in an effort to forestall execution on the judgment pending the outcome of an appeal, signed a guarantee of satisfaction of payment to Zack to become operative upon either the entry of a final decision by the German courts or upon a settlement agreement. During the pendency of the appellate proceedings in Germany, Zack filed suit in the United States District Court for the Eastern District of Virginia seeking to recover against International by attaching one of its vessels, the VIRTUS, in Norfolk. Zack asserted that the attachment action was proper because the SEVERN RIVER had

foundered at sea some three years earlier.

Later in 1971, Newcastle, in an effort to forestall execution on the judgment pending the outcome of an appeal, signed a guarantee of satisfaction of payment to Zack to become operative upon either the entry of a final decision by the German courts or upon a settlement agreement. During the pendency of the appellate proceedings in Germany, Zack filed suit in the United States District Court for the Eastern District of Virginia seeking to recover against International by attaching one of its vessels, the VIRTUS, in Norfolk. Zack asserted that the attachment action was proper because the SEVERN RIVER had run aground. The attachment order was eventually vacated and the suit dismissed. On appeal, the Fourth Circuit reaffirmed the dismissal, holding that because the German judgment was "in rem" against the SEVERN RIVER, it "furnish[ed] no basis for the assertion of an in personam liability of the owner or the attachment of any other vessel owned by International." M. W. Zack Metal Co. v. International Navigation Corp., 510 F.2d 451, 452-53 (4th Cir.), cert. denied, 423 U.S. 835 (1975).

On January 9, 1975, the Hanseatic Provincial Court of Appeals in Germany dismissed Zack's claim against International, finding that the written extension of time to sue from February 16 to May 15, 1961 given to Zack by the Charterer's agent in New York did not bind International, causing Zack's claim against the shipowner to be time-barred under COGSA, 46 U.S.C. Sec. 1303(6), and applicable German law. In addition, while the court found that the Charterer and its partners were liable for the cargo damage, it reduced their liability to $33,000 plus interest and costs.[5/] Thereafter, the Insurers posted a bond to guarantee satisfaction of payment of the Charterer's liability and a lien to protect its interest in Zack's recovery. Zack has yet to execute on the judgment of the German appeals court.

In 1976, Zack moved in the United States District court for the District of New Jesey to have its claim against the SEVERN RIVER restored to the docket. The district court denied the motion and the Third Circuit affirmed. M.W. Zack Metal Co. v. S.S. Severn River, No. 386-61 (D.N.J. Oct. 19, 1976), aff'd by order, 577 F.2d 727 (3d Cir.), cert. denied, 439 U.S. 894 (1978).

Zack filed the instant action in the United States District Court for the Southern District of New York on July 31, 1978 alleging five causes of action. The first three prayed for recovery for cargo damage against International the Charterer, the Charterer and Newcastle, and International and London, respectively. The fourth pleaded for collection upon Newcastle's written guarantee of satisfaction. The final cause of action sought damages against the Insurers for fraud. Zack alleged that International and the Charterer, through attorneys retained by the Insurers, defrauded the courts which had rendered decisions on Zack's cargo damage claims by misstating the law and withholding operative facts. The defendants counterclaimed, charging Zack with malicious prosecution and abuse of process for failing to reduce its claim to judgment in the German courts and for instituting the subsequent actions in the United States.

The district court, on defendants' motion pursuant to Fed. R. Civ. P. 12(b)(6), dismissed all of Zack's claims except for that which sought recovery on the Newcastle guarantee. Judge Sweet found that the cargo damage claims were barred

by the one year limitations period in COGSA, 46 U.S.C. Sec. 1303(6), having been brought eighteen years after delivery of the goods. Judge Sweet found that each of Zack's claims for fraud could be presented only in the court where the fraud was allegedly perpetrated. Alternatively, the court held that an independent action for fraud will lie where, as here, the party alleging fraud had an opportunity to raise these claims in prior proceedings, or where the allegations involve intrinsic fraud.

Following a two-day trial, the district court also dismissed Zack's claim on the Newcastle guarantee without prejudice, finding that Zack had failed to prove that the determination of the Hanseatic Provincial Court in Germany was a "final decision" within the meaning of the guarantee. In addition, the court dismissed defendants' counterclaim holding that Zack's counsel acted in good faith and, therefore, did not possess the required scienter for malicious prosecution or abuse of process.

DISCUSSION

Zack alleges on appeal that its claims for cargo damage are not time-barred; that it presented

sufficient evidence that the Charterer and Newcastle are presently obligated under the Newcastle guarantee to pay Zack $110,000 in damages; and that it may maintain an independent action in federal district court for fraud committed by the Insurers in prior litigation concerning the cargo damage claim. The Insurers contend that the district court erred in dismissing their malicious prosecution and abuse of process counterclaims and in failing to dismiss Zack's claim on the Newcastle guarantee with prejudice.

Zack first contends that the district court erred in dismissing as time-barred its claims for recovery for cargo damage. The pertinent section of COGSA provides that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." 46 U.S.C. Sec. 1303(6). The complaint in this action was filed eighteen years after the SEVERN RIVER arrived in New York with the damaged goods. Zack asserts, however, that it complied with the COGSA's statute of limitations by bringing suit in district court in February 1961. This

claim is frivolous. The mere filing of a suit by Zack within the limitations period did not forever toll COGSA's statute of limitations. Because this suit was not brought within the one year period, Zack is barred from raising these cargo damage claims. See Instituto Cubano De Estabilizacion Del Azucar v. T/V Golden West, 246 F.2d 802, 804 (2d Cir.), cert. denied, 355 U.S. 884 (1957); Badhwar v. Colorado Fuel & Iron Corp., 245 F.2d 903, 907 (2d Cir.), cert. denied, 355 U.S. 862 (1957); Joo Seng Hong Kong Co. v. S.S. Unibulkfir, 493 F.Supp. 35, 39 (S.D.N.Y. 1980).

Zack next alleges that the district court erred in dismissing its claim against the Insurers for fraud allegedly penetrated on the various courts which had rendered decisions on its cargo damage claim. The district court characterized this claim as an independent action for fraud under the saving clause of Fed. R. Civ. P. 60(b).[6/] Zack's allegations that Insurer's counsel perpetrate fraud upon the various courts arguably fits within the savings clause and is not time-barred. See generally Serzysko v. Chase Manhattan Bank, 461

F.2d at 702 n.2. See Marshall v. Holmes, 141 U.S. 589, 596 (1891). Here, Zack had prior opportunities to raise its fraud claims. For example Zack alleges that the Insurers fraudulently concealed from the German trial court their knowledge that the SEVERN RIVER had run aground. Zack has had ample opportunity to raise this claim before the German appeals court. Further, Zack actually raised this argument, though unsuccessfully, in the United States District Court for the District of Virginia in its attachment action against the VIRTUS. Zack also had a chance to raise this claim in its appeal to the Fourth Circuit. Likewise, Zack had the opportunity in both German courts and did try to prove there that the extension of time to sue granted by the Charterer's agent in New York also bound the shipowner. Its claim that the Insurers failed to disclose to it and the courts facts which indicated that COGSA's time-bar covered International, even if true, "does not add up to 'fraud upon the court' for purposes of vacating a judgment under Rule 60(b)." Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 837 (5th Cir. 1980). See H. K. Porter Co. v.

Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118 (6th Cir. 1976); Kupferman v. Consolidated Research & Manufacturing Corp., 459 F.2d 1072, 1080-81 (2d Cir. 1972). Further, we see no reason why the documents that Zack presented below in support of this claim could not have been presented in the prior proceedings. See Konigsberg v. Security National Bank, 66 F.R.D. 439, 442-43 (S.D.N.Y. 1975).

Having found that the district court did not err in dismissing Zack's independent action for fraud because Zack had an opportunity to raise thes claims in prior proceedings, we need not determine whether the claim is also invalid because each allegation of fraud is intrinsic to these other proceedings. See United States v. Throckmorton, 98 U.S. 61, 68 (1878); 7 J. Moore Federal Practice Par. 60.37[1] (2d ed. 1979).

Finally, Zack contends that the district court erred in dismissing without prejudice its claim for $110,000 from the Insurers under the terms of the Newcastle guarantee.[7/] The district court, although recognizing that "some money is owed by the defendants to plaintiff," dis-

missed this claim because Zack had failed to establish "the entry of or the amount of a final judgment in the German courts." Zack asserts that it presented sufficient evidence below, specifically the Newcastle guarantee and a translated copy of the decision of the Hanseatic Provinci Court in Germany, to establish a present right to recover under the guarantee. We disagree. Zack's evidence established only that the Hanseatic Provincial Court had assessed damages of $33,000 against the Charterer. Zack presented no evidence that an accounting of costs and interest had ever been made by the German appeals court. Accordingly, we agree with the district court that Zack has failed to prove that a "final decision" for purposes of the guarantee has been entered in Germany.[8/]

The Insurers' cross-appeal from a dismissal of their counterclaims charging abuse of process and malicious prosecution by Zak in faiing to reduce the decision of the Hanseatic Provincial Court to judgment and in instituting this and other suits. The district court found taht while Zack's counsel is "incompetent," he acted in good faith and therefore did not possess the

necessary scienter to be held liable. The Insurer's sold argument is that anyone who filed so many suits over this one simple damage claim must, as a matter of law, have acted in bad faith. We do not approve of the scatter shot approach taken by Zack's counsel over the last twenty-two years in seeking to recover for the cargo loss. We do not know, however, whethr it should be attributed to incompetence or bad faith. Therefore we hold that the district court's finding that appellant's counsel acted in good faith was not clearly errneous. Fed. R. Civ. P. 52(a).

Affirmed. Cost to the defendants-appellees.

FOOTNOTES

1/ The damaged steel was sold for $42,977.98. Zack claimed that its cost of resale amounted to $12,833.58.

2/ Clause 1 of the bill of lading provided that the shipment was subject to the Carriage of Goods by Sea Act.

3/ The two opinions on appeal, in the action captioned M. W. Zack Metal Co. v. Federal Insurance Co., are reported at 26 A.D.2d

54, 271 N.Y.S.2d 1 (1st Dep't 1966) and 28 A.D.2d 1109, 284 N.Y.S.2d 582 (1st Dep't 1967).

4/ Clause 19 of the billof lading limited losee to $500 per package or per customary freight unit. Of course COGSA's package limitation, 47 Y.S.C. Sec. 1304(5), would apply regardless of this clause. See 46 U.S.C. Sec. 1312. The German trial court computed damages based upon $500 per unit of 1,000 kilograms.

5/ Damages were computed on the basis of $500 per damaged coil. The court determined that 66 coils had been damaged in transit.

6/ Fed. R. Civ. P. 60(b) provides in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5)

> the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment shold have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to defendant not actually personally notified as provided in Title 28, U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the court.

(emphasis added.)

7/ The guarantee stated:

> The undersigned company herewith guarantees to pay upon first request the agreed sum, plus interest and costs, in the amount to which the plaintiff is entitled pursuant to a final decision of the German courts or on basis of a settlement agreement.

App. at 612.

8/ On appeal, the Insurers contend that the district court should have dismissed this cause of action "with prejudice." However, if an accounting of costs and interest is made by the German appeals court, Zack would presumably be entitled to recover on the guarantee.

80-7003
Zack v. Newcastle

CARDAMONE, Circuit Judge (concurring in part, dissenting in part)

The majority votes to affirm the dismissal of the plaintiff's first, second and third causes of actions and to affirm the dismissal of defendant's counterclaim. I concur in those affirmances. However, the majority also votes to affirm the dismissal of plaintiff's fourth and fifth causes of action. From those dispositions I respectfully dissent and vote to reverse and remand the fourth cause of action and to remand for trial the fifth cause of action which alleges fraud on the court.

Turning first to plaintiff's fourth cause of action, Zack obtained a "final decision" suf-

ficient to activate Newcastle's liability under the terms of its written guarantee. That guarantee stated: "The undersigned company herewith guarantees to pay upon first request the agreed sum, plus interest and costs in the amount to which the plaintiff is entitled pursuant to a final decision of the German courts or on basis of a settlement agreement." Appellant's Appendix at 612. In my view the condition of the guarantee has been met and plaintiff is entitled to its benefit.

The majority does not dispute the finality of the German court judgment. It simply holds that since plaintiff has presented no evidence of an accounting of costs and interest there is a failure to prove that a "final decision" has been entered.

Concededly it is possible to construe the guarantee as requiring that "final decisions" include "interest and costs" as determined by the German courts because the reference to that court follows that language. It may, on the other hand, be understood that Newcastle guaranteed to pay the "agreed sum, plus interest" when determined by a "final decision" of the German courts

and guaranteed by pay Zack its "costs" when they are finally determined. Interest was fixed in the German judgment at 5% per annum from February 10, 1961. Judicial and etrajudicial costs are ordinarily computed later under German law and are presently in litigation in Germany. Nothing in the guarantee requires that there be a final decision as to costs prior to enforcing the guarantee on the agreed sum plus interest. At most there is an ambiguity in the guarantee which, of course, must be construed against defendant Newcastle, its drafter, in favor of plaintiff, its beneficiary.

Once the Hanseatic Provincial Court of Appeals in Germany handed down its 60-page decision awarding plaintiff $33,000 plus interest, plaintiff had a right to bring suit on the guarantee in the United States District Court to enforce it. The German court had jurisdiction over the parties and subject matter. Its final judgment, unless tained by fraud or barred by the rules of comity, is entitled to full credit and effect. Hilton v. Guyot, 159 U.S. 113 (1895). A final decision of the German court, under the rules of comity,

should be enforced in the courts of the United States.

Further, this case should be returned to the district court for trial on the independent equitable action for fraud on the court asserted in plaintiff's fifth cause of action. Nothing corrupts the administration of justice so much as a deliberate fraud on a court. Its odiousness, undissipated by the passage of time, lingers like a miasma. It is alleged that we have such a case before us. While the affirmance by the majority of the trial court's dismissal will end this case, it will not - if the allegations of plaintiff's complaint are true - remedy the damaging effects of a claim of fraud now buried in the darkness of a dismissal.

Plaitiff's fifth cause of action asserts an independent equitable action for fraud practiced on courts in the United States and Germany commencing in 1960. The action was instituted in the Southern District of New York on June 31, 1978. The district court and the majority relying upon United States v. Throckmorton, 98 U.S. 61 (1878), held that plaintiff's fifth cause of

action alleging fraud upon the court, which it characterized as essentially a collateral attack on the previously rendered decision, must be made in the various courts which were allegedly defrauded. Decisions of the Supreme Court since Throckmorton were decided in 1878 indicate that the rationale of that case is no longer persuasive. In Throckmorton the Supreme Court used res judicata as the legal device to defeat an action based on an old fraud practiced on a court. The rationale upon which the decision was based appears to be the Court's view that suits may be immortal, but men are not. Id. 69. Thirteen years later the Supreme Court in Marshall v. Holmes, 141 U.S. 589 (1891), permitted an equitable action to be filed where it was against conscience to permit a judgment obtained by claimed fraud to be executed. This time the Court stated that a court, while not sitting in review, should scrutinize the conduct of the parties in a new proceeding to determine if one used fraud to obtain a judgment. If so, the court will deprive him of the benefit of the judgment and any equitable advantage gained. Id. at 599. The view that

"truth is more important than the trouble it takes to get it," set forth in Publicker v. Shallcross, 106 F.2d 949, 952 (3d Cir. 1939) is consistent with Marshall, which Publicker cites at 951.

These two Supreme Court cases afforded ample latitutde to lower courts for over 50 years to decide equitable causes of alleged fraud on the courts in whatever way their own predilections led them. More recently the Supreme Court decided Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). In that case the trial in which the alleged fraud occurred took place in 1929, but the fraud was not fully brought to light until 1941. The Supreme Court said, in discussing the independent equitable action of fraud on the court, that "equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable itnervention, and to accord all the relief necessary to correct the particular injustices involved in these situations." Id. at 248. Based upon this historical progression, I conclude that the harsh rule of Throckmorton

is not the current view of the Supreme Court.

Thus, it is now established that this type of action should be governed by flexibility to afford necessary relief. The district court in granting summary judgment dismissing this cause of action did not examine the facts, but merely concluded that plaintiff was in the wrong forum. However, its power to entertain this action is not limited where there is a claim of fraud upon a court. Fed. R. Civ. P. 60(b). In this case the fraud should have been explored at trial, particularly since on a motion to dismiss all of the plaintiff's allegations of fraud are deemed to be true.

The majority depicts plaintiff as bringing a multitude of vexatious suits. However, Newcastle's behavior from the outset of this sage over 20 years ago reveals a callous disregard for the truth. For example, it led the District Court in Hamburg to exercise in rem jurisdiction over a ship the court was told was siling on the high seas when in fact Newcastle knew that the SEVERN RIVER was under the high seas - it had sunk. Its orchestrated tactics - extending

even to buying the subrogation rights of Zack's American insurer on the damaged cargo claim and using it as a basis to slap a lien on the German judgment to prevent Zack from executing it, and then cooly arguing that Zack did not have a "final decision" from the German court because it had not entered judgment and exeucted on it - have frustrated plaitiff at each and every turn. In my review plaintiff is entitled on the law to have its day in court.

SAME CAPTION

Order Amending Opinion

It is hereby ORDERED:

1. The sentence on page 2124 of the opinion reading:

> On February 11, 1960, Zack commenced suit against SEVERN RIVER and the Charterer in the United States District Court for the Southern District of New York seeking to recover $80,000 in damages, the difference between the market value of the steel in good condition and its salvage value less resale and expenses.

is modified to read:

> On February 11, 1961, Zack commenced suit against the SEVERN RIVER and the

Charterer in the United States District Court for the Southern District of New York seeking to recover $80,000 in damages, the difference between the market value of the steel in good condition and its salvage value less resale expenses.

2. The sentence on page 2123 of the opinion reading:

> Thereafter, on January 27, 1961, Zack sent a letter to the Charterer's agent in New York, Oceana of Canada Ltd., requesting an extension until May 15, 1961 of the limitations period under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. Sec. 1303(6) (1976).[2/]

is modified to read:

> On January 27, 1961, Zack had sent a letter to the Charterer's agent in New York, Oceana of Canada Ltd., requesting an extention until May 15, 1961 of the limitations period under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. Sec. 1303(6) (1976). 2/

Thomas J. Meskill, U.S.C.J.

Richard J. Cardamone, U.S.C.J.

James S. Holden, U.S.D.J.

SAME CAPTION

ORDER DENYING REHEARING

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, M. W. Zack Metal Co.,

Upon consideration by the panel that heard the panel, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal that no such judge has requested that a vote be taker thereon.

A. Daniel Fusaro, Clerk

by:

Francis X. Gindhart
Chief Deputy Clerk

GUARANTEE

Newcastle Protection & Indemnity Association
Milburn House
Newcastle Upon Tyne
NEI INT

November 29, 1971

GUARANTEE

In the legal action of

Zack Metal Company, a corporation under law.

v.

Contam Linie Jansen & Co., a general partnership, and its personally liable partners Hans Harald Erich Jansen, a businessman, and Jurgen K. Kraft, a businessman.

Zack Metal Company, pursuant to decision of the Landgericht (Superior Court) of Hamburg 2087/61 of June 15, 1971, has a claim in the amount of US$ 64,017.63 plus 5% interest since February 10, 1960.

The undersigned company herewith guarantees to pay upon first request the agreed sum, plus interest and costs, in the amount to which the plaintiff is entitled pursuant to a final decision of the German courts or on basis of a settlement agreement.

S/Signature

Judgment

SUPERIOR COURT HAMBURG

In the name of the people pronounced June 15, 1971

In the matter

of Messrs. M. W. Zack Metal Company Corporation Detroit, represented by their director, Mr. Eugene

M. Zack, Detroit, Michigan, United States of America,

Plaintiff,

Mandatary: lawyers Dres. Hasche, Albrecht, Fischer-Zernin, Vogeler, I. Drobnig, Dr. Neubauer, Dr. Strobel, Hamburg,

a g a i n s t

1. The open trading company in Messrs. Contam Linie Hansen & Co., Hamburg-Wandsbek, Claudiuestr, 122,
2. their personally liable partners
   a) merchant Hans Harald Erich Jansen, Hamburg-Wandsbeck, Claudiuestr, 122,
   b) merchant Jurgen Karl Krafft, Hamburg, Borgfelderstr. 66 in Messrs. Rewice,
3. Messrs. International Navigation Corporation, Monrovia, Liberia, represented by their director,

Defendant,

Mandatary: lawyer Dr. Herbert Gienow, Hamburg 1,

the Superior Court Hamburg, Chamber 2 for Commercial Matters, by
Superior Court Director Dr. Sonn,
as singly sitting judge,
adjudges:

1. The defendants to 1) and 2) are condemned as general debtor to pay to the plaintiff
US $ 64,018.83 (in words: sixty four thousand eighteen 83/00 US Dollar)
plus 5% interest since the 10th Febr., 1960.
With the further claim against the defendants to 1) and 2) the plaintiff is non-suited.

2. The defendants to 1) and 2) are non-suited with the counter-claim.

3. The judgment is executable provisionally against a bail of the plaintiff in the amount of DM 360,000,-.
The plaintiff is allowed to put in an execution for partial amounts of DM 20,000,- against a bail in the same amount.
Further the plaintiff is allowed to give bail also by means of an irrevocable bail on own account at a large banking concern in the Federal Republic of Germany.

4. The costs decision remains for the final judgment.

Dr. Sonn

Issued:
(signature)

as registrar of the office

END OF DOCKET